



Neutral
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Jiminez v. Waldbaums

Supreme Court of New York, Appellate Division, Third Department
July 1, 2004, Decided ; July 1, 2004, Entered
95257

Reporter: 9 A.D.3d 99; 780 N.Y.S.2d 799; 2004 N.Y. App. Div. LEXIS 9095

In the Matter of the Claim of Angel Jiminez, Appellant, v. Waldbaums et al., Respondents. Workers' Compensation Board, Respondent.

Subsequent History: [***1] Counsel Amended July 6, 2004.

Prior History: Appeal from a decision of the Workers' Compensation Board, filed April 18, 2003, as amended by a decision filed April 30, 2003. The Board determined that claimant was not entitled to a postretirement award for reduced earnings.

Disposition: Decision of the Workers' Compensation Board reversed; matter remitted.

Core Terms

claimant, disability, retirement, workers' compensation, partial disability, labor market, loss of earnings, postretirement, permanently, compensation payment, voluntary withdrawal, retirement date, seek employment, involuntarily, terminate, rescind

Case Summary

Procedural Posture

Appellant claimant challenged a decision of respondent New York Workers' Compensation Board, which ruled in favor of respondent employer and found that the claimant was not entitled to an award for reduced earnings subsequent to a particular date. The Board had also rescinded all awards of compensation after the claimant's retirement date.

Overview

The Board found that the claimant's loss of earnings subsequent to retirement was not attributable to factors connected with the claimant's work-related injury, but instead was caused by the claimant's failure to seek employment. The Board ruled that because the claimant was only partially disabled, he had a duty to seek work within his restrictions, and because he did not, his loss of earnings post-retirement was not attributable to factors

connected to his injury. On appeal, the court reversed. Because the claimant's retirement was caused by or contributed to by his disability, there had been no voluntary removal from the labor market. Thus, he was entitled to continued compensation. The Board's ruling was internally inconsistent with its prior finding that the claimant's disability caused or contributed to his retirement, and no authority existed to terminate the compensation payments of a permanently partially disabled worker when that worker involuntarily retired because of his disability. The case was remanded.

Outcome

The court reversed and remitted the matter to the Board for further proceedings.

LexisNexis® Headnotes

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

HN1 Where a claimant's retirement was caused by or contributed to by his disability, there has been no voluntary removal from the labor market. Under such circumstances, the claimant is entitled to continued compensation.

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

HN2 No authority exists to terminate the compensation payments of a permanently partially disabled worker when that worker involuntarily retires because of his disability.

Headnotes/Syllabus

Headnotes

Workers' Compensation -- Reduced Earning Benefits -- Postretirement Compensation Payments

Respondent Workers' Compensation Board, after determining that claimant sustained a permanent partial disability and that his subsequent retirement was caused or contributed to by this disability, erred in denying claimant

a postretirement award for reduced earnings. Respondent determined that claimant's loss of earnings subsequent to retirement were not attributable to factors connected to his work-related injury, but instead were caused by his failure to seek employment. However, since claimant's retirement was caused by or contributed to by his disability, there was no voluntary removal from the labor market. Consequently, claimant was entitled to continued compensation. No authority exists to terminate the compensation payments of a permanently partially disabled worker when that worker involuntarily retires because of his disability.

Counsel: *Grey & Grey L.L.P.*, Farmingdale (*Joan S. O'Brien* of counsel), for appellant.

Foley, Smit, O'Boyle & Weisman, Hauppauge (*Theresa E. Wolinski* of counsel), for Waldbaums and another, respondents.

Judges: Before: Cardona, P.J., Crew III, Peters, Mugglin and Rose, JJ. Cardona, P.J., Crew III, Peters and Rose, JJ. Cardona, P.J., Crew III, Peters and Rose, JJ., concur.

Opinion by: Mugglin

Opinion

[*100] [**800] Mugglin, J.

A Workers' Compensation Law Judge's decision that claimant sustained a permanent partial disability and that his subsequent retirement was caused or contributed to by this disability were affirmed by the Workers' Compensation Board. The Board determined, however, that claimant's loss of earnings subsequent to retirement were not attributable to factors connected to his work-related injury, but instead were caused by his failure to seek employment, and rescinded all awards of compensation [***2] after claimant's retirement date. The Board granted claimant leave to reopen the case on production of adequate evidence of a job search after the retirement date to support a claim for reduced earnings. Claimant appeals.

Procedurally, the Board's decision is sufficiently final for purposes of appellate review because the awards were rescinded and the case closed (see *Matter of Jasmine v Rainbow Grill*, 115 A.D.2d 862, 863, 496 N.Y.S.2d 788 [1985]). Contrary to the assertion by the employer and its workers' compensation carrier, the case is not currently pending before the Board.

Turning to the merits, there must be a reversal. **HNI** Where, as here, claimant's retirement was caused by or

contributed to by his disability, there has been no voluntary removal from the labor market (see *Matter of Yannucci v Consolidated Freightways*, 6 A.D.3d 945, 945-946, 775 N.Y.S.2d 193, 194 [2004]; see also *Matter of Lombardi v Brooklyn Union Gas Co.*, 306 A.D.2d 704, 705, 761 N.Y.S.2d 374 [2003]). Under such circumstances, claimant is entitled to continued compensation. Nevertheless, the Board ruled that since claimant was only partially disabled, he had a duty to seek work within [***3] his restrictions; since he had not, his loss of earnings postretirement were not attributable to factors connected to his injury but were caused, instead, by his failure to seek employment and his disability has not adversely affected his lack of postretirement earnings.

We first observe that this ruling is internally inconsistent with the Board's finding that claimant's disability caused or contributed to his retirement. **HN2** No authority exists to terminate the compensation payments of a permanently partially disabled worker when that worker involuntarily retires because of his disability. The cases cited by the Board to support its ruling are [*101] inapposite. In *Matter of Pehuso v Fairview Fire Dist.* (269 A.D.2d 623, 702 N.Y.S.2d 701 [2000]), we held that a fire captain's refusal of a light duty assignment constituted a voluntary withdrawal from the labor market. In *Matter of Holman v Hyde Park Nursing Home* (268 A.D.2d 705, 701 N.Y.S.2d 516 [2000]), we held that substantial evidence supported the Board's determination that a worker who had been fired for poor work performance failed to prove that her loss of earnings were attributable to her injury and were, in fact, attributable to other [***4] factors. *Matter of Diullo v Polytherm Plastics* (125 A.D.2d 792, 509 N.Y.S.2d 899 [1986]) involved a claimant who worked for several years postaccident and was then discharged for misconduct. Under those circumstances, we held that the claimant had the burden of showing by substantial evidence that the limitations on his employment due to his disability were a cause of his subsequent inability to obtain employment. Finally, in *Matter of Muziotte v Brookfield Constr. Co.* (40 A.D.2d 245, 338 N.Y.S.2d 1001 [**801] [1972]), the claimant's postretirement loss of wages was not due to his injury, but to union regulations and the claimant's desire to keep his maximum Social Security benefits. Thus, these cases involve either voluntary withdrawal from the labor market or diminution in wages caused by factors other than the claimant's disability.

Cardona, P.J., Crew III, Peters and Rose, JJ., concur.

Ordered that the decision is reversed, without costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.