Sanchez, Jose, Dec'd

PENSION RESERVE

Calculation

The Department's use of Table C to calculate the pension reserve is consistent with RCW 51.44.070(1) because the statute directs the Department to take into account the experience of the reserve fund in setting annuity values. That the table might not accurately represent current differences in life expectancy does not invalidate the use of Table C because its use adequately reflects the experience of the reserve fund. ...In re Jose Sanchez, Dec'd, BIIA Dec., 01 19644 (2004) [Editor's Note: The Board's decision was appealed to superior court under Yakima County Cause No. 04-2-00582-4.]

Standard of Review

The Department's decision on the appropriate pension reserve amount is reviewable on a preponderance of the evidence standard. ...In re Jose Sanchez, Dec'd, BIIA Dec., 01 19644 (2004) [Editor's Note: The Board's decision was appealed to superior court under Yakima County Cause No. 04-2-00582-4.]

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IN RE: JOSE N. SANCHEZ DEC'D ) DOCKET NOS. 01 19644 & 01 19645
CLAIM NOS. J-247533 & J-284750 ) DECISION AND ORDER

APPEARANCES:

Petitioner/Beneficiary, Isabel Sanchez, by
Smart Law Offices, P.S., per
Darrell K. Smart

Employer, Harold Clayton, DBA Clayton Farms,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Timothy S. Hamill and Steve Puz, Assistants

In Docket No. 01 19644, the petitioner/beneficiary, Isabel Sanchez, filed an appeal with the Board of Industrial Insurance Appeals on August 20, 2001, from an order of the Department of Labor and Industries dated June 18, 2001. The petitioner/beneficiary placed the Notice of Appeal with the U.S. Postal Service, properly addressed to the Board of Industrial Insurance Appeals with sufficient postage affixed, on August 17, 2001. In the Department order of June 18, 2001, the Department corrected and superseded its order dated February 27, 2001; denied time loss compensation for the period from June 22, 1999 through and including February 28, 2000; determined that the claimant was permanently and totally disabled as a result of the effects of the conditions covered under Claim No. J-247533 and Claim No. J-284750; placed the claimant on pension effective February 29, 2000; and deducted a total of $10,157.99, including interest, from the pension reserve for permanent partial disability previously paid. The Department order is REVERSED AND REMANDED.

In Docket No. 01 19645, the petitioner/beneficiary, Isabel Sanchez, filed an appeal with the Board of Industrial Insurance Appeals on August 20, 2001, from an order of the Department of Labor and Industries dated June 18, 2001. The petitioner/beneficiary placed the Notice of Appeal with the U.S. Postal Service, properly addressed to the Board with sufficient postage affixed, on August 17, 2001. In the Department order of June 18, 2001, the Department corrected and superseded its order dated February 27, 2001; denied time loss compensation for the period from June 22, 1999 through and including February 28, 2000; determined that the claimant was permanently and totally disabled as a result of the effects of the conditions covered under Claim No. J-247533 and Claim No. J-284750; placed the claimant on pension effective February 29, 2000; and deducted a total of $10,157.99, including interest, from the pension reserve for permanent partial disability previously paid. The Department order is REVERSED AND REMANDED.
No. J-247533 and Claim No. J-284750; placed the claimant on pension effective February 29, 2000; and deducted a total of $10,157.99, including interest, from the pension reserve for permanent partial disability previously paid. The Department order is REVERSED AND REMANDED.

**DECISION**

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on August 11, 2003, in which the industrial appeals judge affirmed the order of the Department dated June 18, 2001.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We have granted review because we agree with the claimant that interest paid on the permanent partial disability payments should not be deducted from the pension reserve, and to clarify the appropriate standard of review.

This matter involves the means by which the Department effectuates the directives in RCW 51.44.070(1) and RCW 51.32.080(4). Specifically, the claimant’s beneficiary raises the following issues:

1. She contends that use of Table C, a table used to calculate the present value of a claimant’s pension entitlement over his lifetime, is based on data from U.S. mortality rates in 1980, and thus does not comport with the statute or the goals of the Industrial Insurance Act;

2. She contends that use of Table C does not comport with the statute or the goals of the Industrial Insurance Act in that it does not distinguish between gender; because women live longer than men, they will ultimately have more money deducted than is necessary to recoup the permanent partial disability paid;

3. She contends that use of Table C is inappropriate because it is based on an interest rate equal to 6.5 percent, which, in effect, is the interest rate the Department charges over the course of repaying the excess permanent partial disability award. The claimant’s beneficiary argues that this interest rate is too high.

4. She contends that the pension reserve should be reduced only by the amount of permanent partial disability, and should not include interest paid by the Department on the permanent partial disability payments;

5. Finally, she contends that the cost of living adjustment (hereafter, COLA) should be applied to his entitlement before it is reduced by the amount of excess permanent partial disability paid to the claimant.
It is important to understand the means by which the Department sets aside the necessary funds to pay a lifetime of permanent total disability benefits to a given worker. RCW 51.44.070(1) provides as follows:

For every case resulting in death or permanent total disability the department shall transfer on its books from the accident fund of the proper class and/or appropriate account to the "reserve fund" a sum of money for that case equal to the estimated present cash value of the monthly payments provided for it, to be calculated upon the basis of an annuity covering the payments in this title provided to be made for the case. Such annuity values shall be based upon rates of mortality, disability, remarriage, and interest as determined by the department, taking into account the experience of the reserve fund in such respects.

In an effort to comply with this statute, the Department has developed Table C. This is the table used to calculate the present value, that is, the amount of cash necessary at the time the pension is awarded, to fund pension benefits for a given worker until the end of the Department's obligation to the worker, that is, until he or she dies.

Thus, when permanent total disability benefits are awarded, the Department first calculates what it calls the original accident reserve, which is the amount of money to be paid to the worker on a monthly basis. This sum is calculated as directed in RCW 51.32.060, which also is used to calculate monthly time loss compensation benefits. Next, the Department determines the claimant's age at the time the pension benefits were awarded. For any given age, Table C provides a value, which is the amount of money needed to fund one dollar of the worker's pension for the rest of his or her life. Taking the original accident reserve amount and multiplying it by the appropriate value in Table C will provide the sum of money needed at the time the pension benefits are awarded to fund the claimant's pension benefits for the rest of his or her life.

Ordinarily, none of these calculations will affect a given worker's benefits; he or she is, in any event, entitled to the sum set forth in RCW 51.32.060. Even if the sum set aside to fund the benefits is inadequate, the worker's benefits will not change. Similarly, if the sum set aside is more than sufficient, the worker will still receive the same benefits. Any risks taken in the investment of the reserve amount are borne by the Department, as are any errors in the calculation. As a practical matter, in this situation the calculation of the reserve fund does not affect the claimant in any way.

However, this changes when the claimant, as is often the case, receives a permanent partial disability award prior to being determined permanently totally disabled. Rather than simply
deducting a set amount from each pension payment, RCW 51.32.080(4) directs that in such a situation the excess permanent partial disability award "shall be deducted from the pension reserve of such injured worker and his or her monthly compensation payments shall be reduced accordingly." This method of recouping the permanent partial disability award permits the worker to repay the sum over the entire time he or she is entitled to benefits, that is, until the end of his or her life. It may be inferred that this method of repayment is less onerous to the worker than simply to deduct a set amount from his or her monthly entitlement.

To effectuate the directive in RCW 51.32.080(4), the Department determines the amount of permanent partial disability paid to the worker, and then divides it by the sum it has set aside to fund the pension benefits (a sum derived from Table C). This provides a percentage that represents that portion of the pension reserve paid out earlier in the form of a permanent partial disability award. Multiplying this number by the claimant's monthly entitlement equals the amount by which the monthly entitlement is reduced. Clearly, then, the use of Table C directly affects the worker's entitlement in this instance. Because the number provided by Table C is in the denominator of the equation, a higher value in the denominator will equal a smaller number, which in turn means less money deducted on a monthly basis.

Thus, the claimant's beneficiary takes issue with the values provided in Table C in that because it is based on life expectancies in 1980, Table C will assume a lower life expectancy than the present time. Since the Department assumes a lower life expectancy, it need not set aside as much money and the reserve amount will be a smaller sum. Similarly, women have historically lived longer than men, and thus a single gender table will result in an underestimate of how long an injured female worker will live, again resulting in a smaller sum of money set aside to fund her pension. As the size of the fund set aside to fund a pension decreases, the ratio of permanent partial disability to pension reserve fund increases, thus resulting in a larger deduction each month.

The claimant's beneficiary also takes issue with the fact that the Department assumes a discount rate (synonymous in this matter with interest rate) of 6.5 percent interest on the money it sets aside. In other words, it sets aside enough money that, assuming it earns 6.5 percent interest on the fund, will adequately fund a pension for a given worker. Although her argument is somewhat ambiguous, Mrs. Sanchez appears to contend that she is thus being charged 6.5 percent interest on the repayment of the excess permanent partial disability. Booth Dep. at 164-165. As a practical matter, however, if the Department assumes a lower interest rate, then it must set aside a greater sum for the pension reserve. As noted above, a larger sum for pension reserve, when plugged into
the equation, will result in a smaller amount to be deducted from the monthly payment. The 6.5 percent interest rate is embedded in Table C, and the claimant's beneficiary contends that Table C is flawed in that 6.5 percent is too high.

The threshold issue in this matter is the determination of the appropriate standard of review. As always, the language in the statute, RCW 51.44.070, governs this. Although our industrial appeals judge determined that the Department's decision is reviewable as an abuse of discretion, we believe that it is to be reviewed on a preponderance of the evidence basis. First and foremost, we note that while RCW 51.44.070 includes the words "as determined by the Department," this does not confer a discretionary decision upon the Department. This Board has long held that in instances under the Industrial Insurance Act where the Legislature has intended to commit a decision to the Director's discretion, it has explicitly so stated. See In re Gary Manley, BIIA Dec., 66,115 (1986), and In re Susan Irmer, BIIA Dec., 89 0492 (1990). Moreover, we have previously held in a decision not designated as significant, that this particular Department decision is reviewable on a preponderance of the evidence basis. In re Robert A. Burnside, Dckt. No. 00 11502 (May 10, 2001).

It is equally important, however, that we specifically state the Departmental decision to be reviewed. The Legislature conferred the authority, and the obligation, to the Department to transfer enough present-day dollars to fund an annuity sufficient to pay the pension benefits for a given worker. The Department is directed to calculate the annuity based on rates of mortality, disability, remarriage, and interest, taking into account the experience of the reserve fund. The issue, then, is whether the Department's calculation, including Table C, is within the statutory mandate.

Certainly, the claimant's beneficiary presented extensive testimony to the effect that Table C may not accurately reflect the life expectancy of a given individual, since it does not differentiate between gender and race. Assuming the worker can prove that he or she is projected, for whatever reason, to live longer, then the amount of money reserved for that particular worker will be too little. Recall, too, that for any given individual, plugging a higher amount for pension reserve into the equation will result in a proportionate decrease in the amount subtracted from the monthly benefit. Thus, any individual worker may well have reason to argue that a calculation based on values in Table C does not reflect his or her particular circumstance.

RCW 51.44.070(1), however, specifically does not direct the Department to predicate this calculation on a given individual. The statute directs the Department to set annuity values based on variables that encompass overall rates, which reflect the experience of the reserve fund. Indeed,
Table C has withstood a challenge based on inaccurate life expectancy in *Messer v. Department of Labor & Indus.*, 118 Wn. App. 635 (2003), a recently published case. In *Messer*, the appellant argued that Table C was "unreliable," because it failed to incorporate more recent statistics showing a general increase in life expectancy. Division One of the Court of Appeals, however, held that the evidence reflected that Table C was the only table that took into consideration the experience of the reserve fund in this regard, and thus substantial evidence supported the use of Table C.

Similarly, in this matter, while there may be a nationwide difference in life expectancy based on gender, there is no evidence that Table C does not reflect the experience of the reserve fund. Indeed, the only evidence in this respect is that the Department "experts" the reserve fund every year, that is, checks to see if the assets set aside are sufficient to meet liabilities, and has found that its calculations are accurate. In short, while the claimant's beneficiary takes issue with the means by which the Department calculated the pension reserve, there is no evidence in this record that the Department did not do so according to the statute. Indeed, use of any other table that does not incorporate the experience of the reserve fund, as does Table C, would be contrary to the statute.

The same reasoning applies to the Department's use of the 6.5 percent interest rate in setting aside sums for pension reserves. The 6.5 percent interest rate reflects the reserve fund's experience. The claimant's beneficiary argues that she is, in effect, being charged 6.5 percent interest on the excess permanent partial disability sum. She argues that this is "contrary to the remedial nature of the Industrial Insurance Act." Petition for Review, at 4. We note that above all, the issue in this matter is not whether the use of the 6.5 percent interest rate is contrary to the remedial nature of the Industrial Insurance Act; it is whether use of the 6.5 percent interest rate is consonant with the statutory direction. Again, there is simply no evidence that use of the 6.5 percent interest rate does not reflect the experience of the reserve fund. Moreover, the argument that the claimant's beneficiary is being charged 6.5 percent interest is not well taken; she is repaying money her husband previously received based on a ratio that reflects the relationship of the money Mr. Sanchez received to the money set aside to fund his pension (which earns money at 6.5 percent).

Turning then, from the use of Table C, the claimant's beneficiary argues that the amount of excess permanent partial disability should not include sums the Department paid out as interest when it initially paid the permanent partial disability award. In reviewing this file, we note that this issue was decided by way of Summary Judgment. Our industrial appeals judge issued an Order on
Summary Judgment by way of a letter dated May 12, 2003. In the letter, he held that since the claimant's beneficiary did not file any documents containing facts that would create a material issue of fact, he granted Summary Judgment in favor of the Department. However, the parties stipulated to additional facts in a document entitled "Stipulation and Factual Agreement." With the submission of these additional facts, we reverse the Summary Judgment order of our industrial appeals judge.

The Stipulation and Factual Agreement establishes that Mr. Sanchez was paid a total of $10,157.99, which sum represents $10,050 paid for permanent partial disability awards under these claims, and $107.99 in interest paid under Claim No. J-284750. We have previously heard and determined this issue, and have held that the Department cannot include money representing interest payments in the amount deducted from the pension reserve. In re Esther Rodriguez, BIIA Dec., 91 5594 (1993). Accordingly, we reverse and remand these matters with direction to apply only the amount of permanent partial disability awards paid under these claims, not including any sums paid in interest, against the pension reserve amount.

Finally, the claimant's beneficiary argues that the COLA should be computed on her monthly pension entitlement prior to its reduction, based on receipt of a permanent partial disability award. This issue has been addressed by the Supreme Court in Auman v. Department of Labor & Indus., 110 Wn.2d 917 (1988), and more recently in Messer. We will not revisit this issue. Pursuant to the decisions in the aforementioned matters, the COLA shall be computed after reduction of the pension reserve for the permanent partial disability awards previously paid under these claims, pursuant to RCW 51.44.070(1).

In conclusion, we determine that the claimant's beneficiary failed to prove, by a preponderance of the evidence, that the Department violated RCW 51.44.070(1) in using Table C, but that the Department must deduct from the pension reserve fund only that sum of money paid as permanent partial disability award, and not as interest on the permanent partial disability award, and finally, that the Department must compute COLAs based on the monthly pension amount after such reduction. The Department order of June 18, 2001, is reversed, and this matter remanded to the Department with direction to issue a further order determining the claimant was permanently and totally disabled as of February 28, 2000, and deducting from the pension reserve, as calculated by the use of Table C, the sum of $10,050 for previously paid permanent partial disability awards.
FINDINGS OF FACT

1. On April 11, 1983, the claimant, Jose N. Sanchez, filed an application for benefits in Claim No. J-247533 with the Department of Labor and Industries, alleging that he sustained an industrial injury on December 9, 1992, while in the course of employment with Harold Clayton, d.b.a., Clayton Farms. On February 29, 2000, the Department closed the claim with an award for 5 percent of the amputation value of the left leg above the knee joint with short thigh stump (3 inches or below the tuberosity of the ischium). On April 6, 2000, the claimant appealed the order. On February 27, 2001, the Department affirmed the February 29, 2000 order. On April 5, 2001, the claimant appealed the order to the Board of Industrial Insurance Appeals. On April 27, 2001, the Department issued an order reassuming jurisdiction over the claim. On April 30, 2001, the Board issued an order returning the case to the Department for further action. On June 18, 2001, the Department issued an order determining the claimant to be permanently and totally disabled. The order deducted $10,157.99, including interest, from the pension reserve. On August 17, 2001, the claimant filed by mail an appeal from the June 18, 2001 order. On September 27, 2001, the Board issued an Order Granting Appeal and assigned it Docket No. 01 19644.

On July 8, 1983, the claimant filed an application for benefits in Claim No. J-284750 with the Department of Labor and Industries, alleging that he sustained an industrial injury on June 13, 1983, while in the course of employment with Harold Clayton, d.b.a., Clayton Farms. On February 29, 2000, the Department closed the claim with a permanent partial disability of Category 2 permanent cervical and cervico-dorsal impairments and Category 2 permanent dorso-lumbar and/or lumbosacral impairments. On April 6, 2000, the claimant protested the order. On October 24, 2000, the Department forwarded the protest to the Board of Industrial Insurance Appeals. On November 2, 2000, the Board issued an order denying the Department's request to treat the protest as an appeal and issued an Order Denying Appeal. On February 27, 2001, the Department affirmed the February 29, 2000 order. On April 5, 2001, the claimant appealed the February 27, 2001 order to the Board of Industrial Insurance Appeals. On April 27, 2001, the Board issued an order returning the case to the Department for further action. On June 18, 2001, the Department issued an order that determined the claimant to be permanently and totally disabled. The order deducted $10,157.99, including interest, from the pension reserve. On August 17, 2001, the claimant filed an appeal from the order of June 18, 2001. On September 27, 2001, the Board issued an Order Granting Appeal and assigned it Docket No. 01 19645.

2. In its orders of June 18, 2001, the Department determined the excess payment in this case to total $10,157.99. This sum consists of $1,800 paid in a permanent partial disability award under Claim No. J-247533, and $8,250 paid in a permanent partial disability award under Claim
No. J-284750, plus $107.99 paid by the Department as interest on the latter permanent partial disability award.

3. The Department deducted excess permanent partial disability payments in the sum of $10,157.99, which included interest paid on the permanent partial disability award under Claim No. J-284750, from Mr. Sanchez's pension reserve and calculated a new monthly pension payment amount for him before applying cost of living adjustment amounts to his payments.

4. The Department determined the actuarial factors by which the present value of Mr. Sanchez's pension award should be determined by utilizing "Table C."

5. Table C is an actuarial table that does not distinguish between male and female mortality. Table C further bases its calculations on mortality rates derived from data collected from 1980.

6. Table C is an actuarial table that uses a discount, or interest rate equal to 6.5 percent.

7. Table C reflects the experience of the reserve fund with respect to rates of mortality, remarriage, and interest.

8. The Department calculated the claimant's COLA based on his monthly entitlement after reducing that amount due to payment of permanent partial disability, pursuant to RCW 51.32.080.

**CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The Department's calculation of the pension reserve amount, pursuant to RCW 51.44.070(1), is reviewable on a preponderance of the evidence basis.

3. The Department correctly calculated the claimant's pension reserve amount, pursuant to RCW 51.44.070(1), prior to taking deductions as required by RCW 51.32.080.

4. The Department incorrectly included interest paid with installments of payments for permanent partial disability, pursuant to RCW 51.32.080(6), when reducing the pension reserve, pursuant to RCW 51.32.080(4).

5. The COLA adjustment is properly applied to the claimant's monthly entitlement after its reduction for excess permanent partial disability.
6. The Department orders of June 18, 2001, are incorrect, and are reversed. These matters are remanded to the Department with direction to issue further orders determining Mr. Sanchez to have been permanently totally disabled effective February 29, 2000, and to deduct the sum of $10,050 paid out in permanent partial disability awards under these claims from the pension reserve. The pension reserve shall be calculated by use of Table C, and any cost of living adjustments shall be calculated using the claimant's entitlement as reduced, pursuant to RCW 51.32.080(4), due to payment of excess permanent partial disability. Thereupon, these claims will be closed.

It is so ORDERED.

Dated this 20th day of January, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ THOMAS E. EGAN Chairperson

/s/ FRANK E. FENNERTY, JR. Member

/s/ CALHOUN DICKINSON Member