Palmer, Douglas

SCOPE OF REVIEW

Time-loss compensation

Where the Department had previously considered the claim for total permanent disability, the issue of permanent total disability is within the Board's scope of review in an appeal from an order of the Department paying time-loss compensation benefits. *Distinguishing In re Ann Boyle,* BIIA Dec., 93 3740 (1994). **….*In re Douglas Palmer,* BIIA Dec., 14 13660 (2015)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DOUGLAS R. PALMER	)	**DOCKET NO. 14 13660**
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEAL**
CLAIM NO. AF-50238	)	**FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Douglas R. Palmer, by
Delay, Curran, Thompson, Pontarolo & Walker, P.S., per
Michael J. Walker

Employer, Seeds, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Molly M. Parish

The claimant, Douglas R. Palmer, filed an appeal with the Board of Industrial Insurance Appeals on March 24, 2014, from an order of the Department of Labor and Industries dated March 19, 2014. In this order, the Department paid time-loss compensation benefits from March 6, 2014, through March 19, 2014. The appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

OVERVIEW

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a November 13, 2014 Proposed Decision and Order in which the industrial appeals judge dismissed the appeal for failure to make a prima facie case.

Mr. Palmer is seeking a pension in an appeal from an order paying time-loss compensation benefits. The industrial appeals judge felt bound by the Board's decision in *In re Ann Boyle*[1] that held that the Board could not address questions of fixity and permanent disability in an appeal from a time-loss compensation benefits order. She therefore granted the Department's Motion for Summary Judgment and dismissed the appeal.

Boyle and subsequent decisions applying a similar analysis are distinguishable.[2] In *Boyle*, there was no discussion of RCW 51.32.055(2) and (3) that require the Department to issue an order

[1] *In re Ann Boyle,* BIIA Dec., 93 3740 (1994).
[2] *In re Kimberley L. Johns,* Dckt. No. 09 10818 (January 28, 2010) (*Johns 1*); *In re Kimberley L. Johns,* Dckt. No. 09 20217 (October 14, 2010) (*Johns 2*); and *In re Lai Ping-Bazzell,* Dckt. No. 12 25379 (November 14, 2013).

addressing permanent disability "in every instance where permanent disability is likely to be present."[3] A party may request a determination or the Department may initiate action on its own. In *Johns 1*, *Johns 2*, and *Ping-Bazzell*, the Board discussed this statutory obligation and suggested those workers might seek a determination of permanent disability at the Department level. The industrial appeals judge made the same suggestion here. But this case differs from our prior cases. The statutory requirement that the Department issue an order addressing permanent disability has already been triggered.

When it issued the March 19, 2013 time-loss order, the Department had received all the medical and vocational information necessary to determine whether Mr. Palmer was permanently disabled. The information showed that "permanent disability [was] likely to be present," and the Department had referred the case to its pension desk for evaluation. Under those circumstances, the Department was statutorily obligated to issue an order adjudicating whether Mr. Palmer was entitled to permanent disability benefits or not. Given the status of the claim, when the Department issued the March 19, 2013 order determining that Mr. Palmer was entitled to temporary total disability benefits, the Department was also deciding he was not entitled to permanent disability benefits.

Mr. Palmer appealed the time-loss order, continuing to allege he was permanently totally disabled. During the period when the Department could have reassumed jurisdiction, Mr. Palmer's attorney notified the Department he was seeking a pension. The Department declined to take the case back and reconsider.[4]

The question of whether Mr. Palmer is permanently totally disabled is within the scope of our review.[5] The Proposed Decision and Order is vacated. The Department's Motion for Summary Judgment based on the argument that permanent total disability cannot be litigated in this appeal is denied. The matter is remanded for further proceedings on whether Mr. Palmer is entitled to permanent disability benefits.

DECISION

The evidence submitted as part of the summary judgment process shows that Mr. Palmer fractured his left shoulder when he fell through a catwalk on October 3, 2007. On March 26, 2008, Andrea Barrett, M.D., performed surgery. On May 8, 2009, the Department accepted responsibility for reflex sympathetic dystrophy syndrome. On October 29, 2009, Mr. Palmer completed a pain

[3] RCW 51.32.055(2)
[4] RCW 51.52.060(4).
[5] *In re Sheri Gorham*, BIIA Dec., 11 23281 (2013); and *In re James P. Schlicting*, Dckt. No. 13 18691 (October 6, 2014).

clinic program and was determined to have reached maximum medical improvement (MMI). On November 19, 2009, Thomas A. Polsin, MS, CRC, CDMS, determined: "Vocational Case Closure, Referral to Pension evaluation: Vocational services, at this time will certainly do nothing to enable Doug to be able to return to gainful employment at his previous (or, indeed, ANY) level. His claim should be evaluated for closure."[6] On December 18, 2009, Dr. Barrett reported that Mr. Palmer could not work on a full-time basis and his condition was fixed and stable. On January 7, 2010, vocational counselor Matt Nystul recommended closure of vocational services because the claimant was "not able to work or to participate in voc rehab."[7]

Two years later, the Department referred Mr. Palmer for an independent medical examination (IME) that was performed on March 8, 2012, by Jennifer James, M.D., and Clarence Fossier, M.D. They concluded that Mr. Palmer had reached MMI and should be rated for the complex regional pain syndrome in his left upper extremity that they related to the industrial injury. As to his employability, they said: "There are restrictions that prevent him from returning to work, as he has no use of the left upper extremity, according to presentation and all medical documentation."[8] They assessed a 99 percent impairment of the left upper extremity.

On May 14, 2012, the attending physician, W. Kimball Mellor, M.D., concurred with the IME. On July 30, 2012, the Department notified Mr. Palmer that based on Mr. Nystul's report, he was no longer required to participate in vocational services because they were unlikely to help him return to work. On that same date, the Department referred the case for a pension evaluation.

On August 19, 2013, Mr. Palmer called the Department to check on the status of his pension referral. The Activity Log shows he was informed that "pension deferred the referral back down to us and I will be addressing that this week and will contact him at the number he provided."[9] There's no indication that the Department took any further action until January 23, 2014, when the Jurisdictional History shows the Department issued an order paying time-loss compensation benefits from January 3, 2014, through January 22, 2014. According to the Jurisdictional History, the Department continued to issue bi-monthly time-loss compensation benefits orders through April 16, 2014.

On February 13, 2014, and March 27, 2014, Dr. Mellor certified that Mr. Palmer could not work "per IME." On both Activity Prescription Forms he stated: "Disability is permanent and rated

[6] Exhibit No. 5 (November 19, 2009 Comprehensive Vocational Evaluation Report, at 9).
[7] Exhibit No. 5 (Ability to Work Assessment, at 3; See also, summation on page 8.)
[8] Exhibit No. 6, at 8.
[9] Exhibit No. 11.

at IME."[10] On March 19, 2014, the Department issued an order paying time-loss compensation benefits from March 6, 2014, through March 19, 2014. On March 24, 2014, Mr. Palmer filed an appeal from the March 19, 2014 time-loss order, seeking "PPD, TPD." On April 1, 2014, a Department claims consultant called Mr. Palmer's attorney in response to the Notice of Appeal to clarify the issues on appeal. The attorney confirmed that Mr. Palmer was seeking permanent total disability benefits. On April 22, 2014, the Department declined to reassume jurisdiction.

As the Board held in *Boyle*, questions of fixity and permanent disability are not generally within the scope of the Board's review in an appeal from a time-loss order. But the Department order must be read in context to determine what issues were before the Department at the time and what issues were adjudicated by the order. [11] The vocational and medical experts agree that Mr. Palmer is permanently totally disabled. The Department has had that information for years and referred the case to the pension desk in July of 2012. Mr. Palmer followed up regarding that referral in August 2013, and his attending physician certified he was permanently totally disabled prior to the issuance of the March 19, 2014 time-loss order.

The Department had everything it needed to determine whether Mr. Palmer was permanently disabled prior to issuing the March 19, 2014 time-loss order and had in fact considered the question. For State Fund cases, RCW 51.32.055(2) requires that all "determinations of permanent disabilities shall be made by the department." Either the worker or the employer "may make a request or the inquiry may be initiated by the director . . . . Determinations shall be required in every instance where permanent disability is likely to be present. . . ." Under RCW 51.32.055(3), a "request for determination of permanent disability shall be examined by the department . . . and the department shall issue an order in accordance with RCW 51.52.050 . . . ."

In dismissing Mr. Palmer's appeal, the industrial appeals judge suggested that he could request a determination of permanent disability from the Department under RCW 51.32.055. But Mr. Palmer need not make another request. The Department has already initiated the determination of permanent disability within the meaning of RCW 51.32.055(2) by referring the claim for a pension evaluation.

RCW 51.32.055(2) also requires the Department to make a determination "in every instance where permanent disability is likely to be present." The Department's own IME doctors have said no further treatment is warranted and Mr. Palmer has a permanent impairment equal to 99 percent

[10] Exhibit Nos. 15 and 16.

[11] *In re Sheri Gorham*, BIIA Dec., 11 23281 (2013); and *In re James P. Schlicting*, Dckt. No. 13 18691 (October 6, 2014).

of the left arm. The Department's own vocational expert has provided information showing that Mr. Palmer is permanently unable to work. The attending physician has certified that as well. There is no question that "permanent disability is likely to be present." Regardless of whether Mr. Palmer's August 18, 2013 phone call to the Department is considered a request for a determination of permanent disability, the requirements of RCW 51.32.055(2) and (3) have already been triggered because of the Department's own actions and because the Department has received medical and vocational information showing that the claim is ready for closure.

The Department's response was a determination in the March 19, 2013 order that Mr. Palmer's total disability was temporary rather than permanent. Mr. Palmer continued to raise the issue of permanent disability in his Notice of Appeal; his attorney advised the Department he was seeking a pension during the reassumption period; and the Department chose not to reassume jurisdiction.[12] The question of whether Mr. Palmer is permanently totally disabled is within the scope of our review.

The November 13, 2014 Proposed Decision and Order is vacated and the Department's Motion for Summary Judgment is denied. This order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. The appeal is remanded to the hearings process as provided by WAC 263-12-145(4) for further proceedings as stated in this order. Unless the matter is settled or the appeal is dismissed, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain findings and conclusions on each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104.

Dated: March 20, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

[12] RCW 51.52.060(4).