

Pellor, Charles

EXPERT TESTIMONY

Admissibility of opinions

A permanent impairment opinion not based on the AMA Guides to permanent impairment affects the weight to be given the opinion, but is not a reason to exclude the opinion.

...*In re Charles Pellor*, BIIA Dec., 15 11481 (2016)

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: CHARLES A. PELLOR) **DOCKET NO. 15 11481**
)
) **ORDER VACATING PROPOSED DECISION**
) **AND ORDER AND REMANDING THE APPEAL**
) **FOR FURTHER PROCEEDINGS**
CLAIM NO. AG-86452)

Charles A. Pellor appeals the Department's decision to close his claim with no permanent partial disability award. At his hearing before this Board, Mr. Pellor was unrepresented. Mr. Pellor testified on his own behalf and presented Edward J. Boyko, M.D., his attending physician, in support of his contention that he is entitled to further treatment and/or an increased permanent partial disability award.

During Dr. Boyko's testimony, the Department lodged an objection to his permanent impairment testimony because the rating was not purportedly performed according to the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition. Our hearing judge agreed and Mr. Pellor's expert was not given an opportunity to give a specific rating or provide a basis for his opinion. After Mr. Pellor rested, the Department made a motion to dismiss under the provisions of CR 41(b)(3). Our hearing judge granted the motion and dismissed Mr. Pellor's appeal for failure to make a prima facie case.

Mr. Pellor argues that Dr. Boyko was not allowed to give a disability rating and again contends that he is entitled to a higher permanent impairment award. We find that our hearing judge erroneously sustained the Department's objection regarding Dr. Boyko's permanent impairment testimony and that by doing so, she stymied Mr. Pellor's efforts in making a complete record. Further hearings are necessary to allow Dr. Boyko the opportunity to provide full and uninterrupted testimony as to the question of Mr. Pellor's permanent partial disability.

The Proposed Decision and Order of January 6, 2016, is vacated and this appeal is **REMANDED FOR FURTHER PROCEEDINGS.**

DISCUSSION

There is no doubt that Mr. Pellor failed to make a prima facie case as it relates to the question of his entitlement to further treatment. However, we grant review to address our hearing judge's ruling as it pertains to the Department's objection lodged during Dr. Boyko's testimony. Specifically, Dr. Boyko testified that he believed that Mr. Pellor's permanent partial disability was considerably more than the 5 percent previously awarded. Immediately following this statement, the Department objected and contended that Dr. Boyko's testimony was not useful because he did

1 not utilize the AMA Guides 5th Edition for rating permanent impairment. Our hearing judge agreed
2 and did not allow Dr. Boyko to provide specific testimony as to what permanent impairment he
3 believed was appropriate for Mr. Pellor. Even when Mr. Pellor specifically requested that Dr. Boyko
4 "go ahead and comment on the percentage of disability anyway . . .," our hearing judge denied the
5 request by saying that it "would not be helpful."¹ In our opinion, this is error.

6 While it is true that the Department and the Board generally employ the AMA Guides in
7 evaluating impairments, Dr. Boyko was not given an opportunity to present any alternative rating
8 standard. Impairment of upper extremity conditions can be rated according to a nationally
9 recognized impairment rating guide.² Being board-certified in internal medicine and actively
10 practicing at the VA Puget Sound, Dr. Boyko should have been afforded the opportunity to provide
11 his rating and to explain the basis and/or methodology underlying his opinion. The fact that he did
12 not utilize the AMA Guides does not make his testimony inadmissible. It merely goes to weight and
13 would be best addressed in cross-examination. Because Dr. Boyko was not allowed to provide
14 further comment regarding Mr. Pellor's permanent partial disability, we do not know whether he
15 formally assessed Mr. Pellor or whether his belief that the permanent impairment was considerably
16 more was a generic opinion with no medical substantiation. We also do not know whether the VA
17 has a rating protocol that is different from the AMA Guides, but is nonetheless nationally
18 recognized. Had Dr. Boyko been allowed to proceed with his testimony, many of these questions
19 would have been answered and we would have had a complete record on which to assess whether
20 a prima facie case had been made.

21 Because our hearing judge's erroneous ruling prevented Mr. Pellor from presenting a prima
22 facie case regarding his entitlement to an increased permanent impairment, we find that further
23 hearings are necessary. Dr. Boyko should be given the opportunity to provide full and
24 uninterrupted testimony as to the question of Mr. Pellor's permanent impairment and if necessary,
25 our hearing judge must ask questions to elicit the facts needed to support a prima facie case given
26 that Mr. Pellor is not represented.³

27 ORDER

28 The Department's CR 41(b)(3) motion is denied. This appeal is remanded to the hearings
29 process, as provided by WAC 263-12-145(4), for further proceedings as indicated by this order.

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31 ¹ 10/14/15 Tr. at 66.

32 ² RCW 51.32.080(3)(a); WAC 296-20-19020(1)(b).

³ *In re Evangelina Acevedo*, BIIA Dec., 08 15613 (2009).

1 Unless the matter is settled or dismissed, the industrial appeals judge will issue a new Proposed
2 Decision and Order. The new order will contain findings and conclusions as to each contested
3 issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition
4 the Board for review, as provided by RCW 51.52.104. This order vacating is not a final Decision
5 and Order of the Board within the meaning of RCW 51.52.110.

6 Dated: March 21, 2016.

7 BOARD OF INDUSTRIAL INSURANCE APPEALS

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10 /s/ _____
11 DAVID E. THREEDY Chairperson

12
13 /s/ _____
14 FRANK E. FENNERTY, JR. Member

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17 /s/ _____
18 JACK S. ENG Member

1 **Addendum to Decision and Order**
2 **In re Charles A. Pellor**
3 **Docket No. 15 11481**
4 **Claim No. AG-86452**

5 **Appearances**

6 Claimant, Charles A. Pellor, Pro Se

7 Employer, Fairfax Hospital, Inc., None

8 Department of Labor and Industries, by The Office of the Attorney General, per James M. Hawk

9 **Department Order(s) Under Appeal**

10 In Docket No. 15 11481, the claimant, Charles A. Pellor, filed a protest with the Department of
11 Labor and Industries on January 9, 2015. The Department forwarded it to the Board of Industrial
12 Insurance Appeals as a direct appeal on February 9, 2015. Mr. Pellor appeals a Department order
13 dated December 11, 2014. In this order, the Department affirmed as correct its previous order
14 dated October 27, 2014 which closed his claim effective October 27, 2014 with no permanent
15 partial disability.

14 **Petition for Review**

15 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
16 and decision. The claimant filed a timely petition for review of Proposed Decision and Order
17 issued on January 6, 2016.
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