McCleneghan, Leona

RES JUDICATA

Aggravation

The *Jessie White* (48 Wn.2d 413) rule has no application where the evidence establishes the existence of disability on the first terminal date. The failure of the Department to compensate the worker for such disability constitutes a determination that the disability existing at that time was not caused by the industrial injury. ***….In re Leona McCleneghan*, BIIA Dec., 24,922 (1967)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LEONA McCLENEGHAN	)	**DOCKET NO. 24,922**
	)	
CLAIM NO. C-921532	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Leona McCleneghan, by
Walthew, Warner & Keefe, per
Eugene Arron

Employer, American Linen Supply Company,
None

Department of Labor and Industries, by
The Attorney General, per
James M. Beecher, Thomas O'Malley, and Floyd V. Smith, Assistants

This is an appeal filed by the claimant, Leona McCleneghan, on August 9, 1965, from an order of the Supervisor of Industrial Insurance dated July 8, 1965, denying her application to reopen her claim for aggravation of condition. **SUSTAINED**.

DECISION

This matter is before the Board for determination based on a timely Statement of Exceptions filed by the Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on October 20, 1966, reversing the order from which this appeal was taken and remanding the claim to the Department with direction to pay the claimant a permanent partial disability award of 25 per cent of the maximum allowable for unspecified disabilities.

The issue raised by the Department's exceptions is strictly one of law. Simply stated, this issue is whether or not, under the circumstances of this case, it was necessary for the claimant to establish that there was an actual worsening of her low back condition attributable to the industrial injury she sustained on September 6, 1962, between May 20, 1964, when her claim was closed without payment of any permanent disability award, and July 8, 1965, when the Department denied her application to reopen her claim on the ground of aggravation.

The hearing examiner made no finding of aggravation, but simply found, based on the testimony of the claimant's medical witness, that the claimant had a low back disability on the second terminal date, due to her industrial injury, equal to 25 per cent of the maximum allowable for unspecified disabilities, and concluded therefrom, as a matter of law, based on the decision of our

Supreme Court in the case of White v. Department of Labor and Industries, 48 Wn. 2d 413, that the claim should have been reopened by the Department to pay an award in that amount. In substance, the Proposed Decision and Order is based on the theory that, inasmuch as it is res judicata that the claimant had no disability on the first terminal date, the only issue presented was whether or not she did in fact have any permanent disability due to her industrial injury on the second terminal date.

While the theory on which the Proposed Decision and Order was based may well be the practical effect of the holding of the court in a Jessie White case, supra, in cases involving the same factual pattern and particularly where no issue of causal relationship is involved, the basic issue in every case when an appeal is taken by a workman from a Department order denying an application to reopen his claim for aggravation, is whether or not his condition for which the claim was allowed worsened as the result of his industrial injury during the period between the date his claim was last closed and the date his application was denied. In the Jessie White case, the court expressly stated:

> "To establish his claim for aggravation of a prior industrial injury, the burden was on the claimant to prove by medical testimony (some of it based on objective findings) that an aggravation of his condition occurred between the terminal dates; i.e., June 16, 1949, when the department closed his claim allowing only medical treatment, and September 22, 1950, when the department refused to reopen his claim for aggravation. Moses v. Department of Labor and Industries, 44 Wn. (2d) 511, 268 P. (2d) 665; Johnson v. Department of Labor and Industries, 45 Wn. (2d) 71, 273 P. (2d) 510."

As a corollary of this rule, the court, in effect, held that since the claimant's claim in that case was closed with no permanent disability award, it was proper to include in a hypothetical question propounded to the claimant's medical witness, the assumption that the claimant had no disability on the first terminal date. However, in holding that there was sufficient medical evidence in the record to justify submitting the case to a jury, the court pointed out that there was medical evidence of an objective nature in the record on which the claimant's medical witness could base his opinion, and added:

> "Dr. Jackson testified that the claimant's condition became worse during the aggravation period. He based his opinion upon the history received from the claimant, a comparative study of the X-ray films he took in 1953 with those taken by the department on April 13, 1950 (a date within the aggravation period) and his own examination." (Emphasis by the court)

In the instant case, the claimant's medical witness, Dr. Allan Sachs, who had examined her on April 9, 1965, at which time he made certain findings of low back disability, received no history from the claimant of any worsening of her condition during the aggravation period and testified that the claimant's disability "just continued" from the date of her injury, which he stated had aggravated a pre-existing low back condition. He then testified as follows:

> "Q (By Mr. Arron) Assuming she had do disability in May of '64 –
>
> A I can't assume that.
>
> Q Well, I'm asking you, legally, to assume that she had no disability in May of '64 and comparing that assumption with what you find, was there any aggravation during that year's period?
>
> A If I assume that she had no disability a year before than I must say that there is aggravation because there was disability present when I saw her."
>
> * * *
>
> "Q (By Mr. Arron) And on the basis of that same assumption then, doctor, would the aggravation be 25 percent of the unspecified?"
>
> * * *
>
> A It isn't based on that -- it's just that it's 25 percent as compared with if there was nothing wrong with her.
>
> Q (By Mr. Arron) You mentioned, doctor –
>
> A The point I'm trying to make is, I'm not making it on the basis of that comparison." (Emphasis added)

Further, the record before us affirmatively shows by the testimony of the claimant herself, the testimony of Dr. Sachs, and the testimony of Dr. Forrest L. Flashman, an orthopedic specialist, who examined the claimant as a consultant for her attending physician on the day after her injury and subsequently examined her at the request of the Department on November 13, 1962, March 24, 1964 and June 16, 1965, that she did have permanent low back disability when her claim was closed in 1964. However, it was Dr. Flashman's testimony that the claimant had recovered from the acute back strain she sustained at the time of her injury and that her disability in 1964 as well as in 1965 was due to a pre-existing condition.

The record further shows that after the claimant had protested a prior order closing her claim without payment of any permanent disability award on December 11, 1963, the Supervisor entered an order on January 17, 1964, holding the December 11, 1963 order in abeyance, pending further investigation and subsequently sent the claimant to Dr. Flashman for the examination he conducted on March 24, 1964. Following receipt of a report of Dr. Flashman's examination, the Supervisor then entered his order of May 20, 1964, again closing the claim without payment of any permanent disability award, from which no appeal was taken.

Obviously, the rule that a Department order, closing a claim without payment of a permanent disability award is res judicata "as to the extent of the claimant's injury" at that time, does not mean that such an order constitutes a determination that a claimant had no permanent disability of any king, but rather, constitutes a determination that he had no such disability due to his injury. It is clear from the record in this case that the Supervisor's order of May 20, 1964, did not constitute a determination that the claimant had no low back disability at that time, but rather, that any such disability she had was not due to her injury. There was no such issue of causal relationship involved in the Jessie White case and in our opinion therefore, it was incumbent on the claimant her to establish that she suffered an actual increase in disability due to her injury during the period in issue and that this could not be established based solely on a forced assumption contrary to the claimant's medical witness' own judgment, that she had no low back disability on May 20, 1964. There was a complete failure of proof in this regard and the claimant simply attempted to litigate an issue which should have been litigated by an appeal from the Supervisor's order of May 20, 1964. We do not, therefore, reach the merits of the question of causal relationship and are constrained to conclude that the claimant has failed to establish a prima facie case of her right to additional benefits under the Act as a matter of law, and that the order appealed from must be sustained.

In the course of our consideration of the record, we have reviewed all rulings of the hearing examiners on the admissibility of evidence and, finding no prejudicial error involved, said rulings are hereby sustained.

FINDINGS OF FACT

Based on our review of the record herein, the Board finds as follows:

1. The claimant, Leona McCleneghan, sustained a low back injury in the course of her employment with the American Linen Supply Company on September 6, 1962. Her claim based thereon, filed with the Department of Labor and Industries, was allowed, treatment was provided and time-

loss compensation paid. On January 4, 1963, the Supervisor of Industrial Insurance issued an order, closing the claim with time-loss compensation as paid to December 7, 1962, and without payment of any permanent disability award.

2. On May 1, 1963, the claimant filed an application to reopen her claim on the ground of aggravation of her condition. This application was granted by an order of the Supervisor dated June 7, 1963, further treatment was provided and thereafter, on December 11, 1963, the Supervisor issued an order again closing the claim without payment of any permanent disability award. Following receipt of a protest by the claimant, the Supervisor issued a further order on January 17, 1964, holding the order of December 11, 1963 in abeyance, pending further investigation. The Department then had the claimant examined by Dr. Forrest L. Flashman, an orthopedic surgeon, and following receipt of a report of his investigation, the Supervisor issued a final order providing for furnishing the claimant with a lumbosacral brace and thereupon closing the claim without payment of any permanent disability award. No appeal was taken from the last mentioned order.

3. On April 1, 1965, the claimant filed an application to reopen her claim for aggravation of condition. On July 8, 1965, the Supervisor entered an order denying the application and segregating the condition described as "degenerative intervertebral disc lesion with local hypertrophic osteoarthritis at the lumbosacral level," as unrelated to the injury for which this claim was filed. On August 9, 1965, the claimant appealed to this Board, and on August 27, 1965, the Board granted the appeal and assigned it Docket No. 24,922.

4. Hearings were held in connection with this appeal, and on October 20, 1966, a hearing examiner issued a Proposed Decision and Order. Thereafter, a timely Statement of Exceptions thereto was filed by the Department of Labor and Industries.

5. The claimant had a low back disability when her claim was closed on May 20, 1964, and the Supervisor's order of that date was based on medical evidence that such disability was not due to her industrial injury of September 6, 1962.

6. The claimant suffered no increase in her low back disability between May 20, 1964 and July 8, 1965.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Board concludes:

1. This Board has jurisdiction of the parties and subject matter of this appeal.

2. The claimant has failed as a matter of law to establish her right to additional benefits under the Workmen's Compensation Act, and the

order of the Supervisor of Industrial Insurance issued herein July 8, 1965, should therefore be sustained.

It is so ORDERED.

Dated this 15th day of September, 1967.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
J. HARRIS LYNCH Chairman

/s/
R. M. GILMORE Member

DISSENTING OPINION

The Industrial Insurance Act is remedial in nature; its purpose is to assure compensation to injured workmen and/or their dependents for permanent disabilities caused by industrial injuries and occupational diseases.

I am persuaded that the preponderance of the believable evidence in the record before this Board shows that this injured workman has sustained permanent disability which is causally related to the industrial injury which occurred on September 6, 1962.

I do not propose to argue the legal-technical issue posed by this case and so ably set forth in the majority opinion. I find it sufficient, at this time, to state that in my view, the purpose of the Act is thwarted when permanent disability compensation is denied to an injured workman because of alleged failure to overcome some legal-technical obstacle standing in the path of equity. Leona McCleneghan has proven her right to the benefits of the Act; the effort from that point on should be one of liberal endeavor to assure that she receive all benefits to which she is entitled. I am persuaded that her permanent disabilities, caused by the injury was, on July 8, 1965, equal to 25 per cent of the maximum allowable for unspecified disabilities. To this date she has received no award for permanent disability. I would award her a permanent partial disability award equal to 25 per cent of the maximum allowable for unspecified disabilities, to which I believe she is entitled.

Dated this 15th day of September, 1967.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
R. H. POWELL Member