Dejneka, Zotyk

SCOPE OF REVIEW

Issues limited by notice of appeal

When the worker appeals and the employer fails to cross-appeal, the Board may not reduce a disability award below that granted by the Department, even though the evidence does not support that award. **….*In re Zotyk Dejneka*, BIIA Dec., 51,408 (1979)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ZOTYK DEJNEKA	**)**	**DOCKET NO. 51,408**
	)	
CLAIM NO. G-764038	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Zotyk Dejneka, by
Jorgen E. Schleer

Employer, Washington Iron Works, by
Nick S. Verwolf

Department of Labor and Industries, by
The Attorney General, per
Dinah Pomeroy and John Aaby, Assistants

This is an appeal filed by the claimant on February 24, 1978, and an amended notice of appeal filed on May 5, 1978, from an order of the Department of Labor and Industries dated October 24, 1977, wherein the claim was closed with a permanent partial disability award of 10% as compared to total bodily impairment. **AFFIRMED**.

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 by a hearing examiner for this Board on May 2, 1979, in which the order of the Department dated January 31, 1978 was affirmed.

The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The issue presented by this appeal and the evidence presented by the parties are very adequately set forth in the hearing examiner's Proposed Decision and Order. Although we agree with the eventual conclusions of the hearing examiner, we feel additional comment is necessary concerning the disability award granted by the Department.

Effective October 1, 1974, the Department of Labor and Industries promulgated rules providing a comprehensive system for rating unspecified permanent partial disabilities. These administrative regulations have come to be commonly known as the "categories system" for evaluating permanent impairment, and are found in the Washington Administrative Code at 296-20-

200 et seq. The rules were adopted under authority granted by the legislature in 1971 which amended RCW 51.32.080.

That amendment specified in part:

> "That in order to reduce litigation and establish more certainty and uniformity in the rating of unspecified permanent partial disability, the department shall enact rules having the force of law classifying such disabilities in the proportion which the department shall determine such disabilities reasonably bear to total bodily impairment."

The general rules in WAC 296-20-210 require examining physicians to follow the rules and also set forth in Rule 3 the directive that:

> "(c) The examining physician shall not assign a percentage figure for permanent bodily impairment described in the categories established herein."

The special rules for evaluation of permanent bodily impairment, WAC 296-20-220, include the requirement in Rule 7 that:

> "The examining physician shall select the one category which most accurately indicates the overall degree of permanent impairment unless otherwise instructed. Where there is language in more than one category which may appear applicable, the category which most accurately reflects the overall impairment shall be selected."

WAC 296-20-670 sets forth rules for determining disability, describing in Rule 1 that the determination of the percentage of disability is to be "solely an administrative function and shall be done only in accordance with the tables of disability...." Rule 2 of that section requires the Department to award the percentage difference between disability for the category of impairment which pre-existed an industrial injury and the disability for the category of permanent impairment existing after the injury.

Mr. Dejneka filed a claim for an occupational disease after the effective date of the Department's impairment evaluation rules. The claim was accepted and eventually closed with a permanent partial disability award of 10% as compared to total bodily impairment.

WAC 296-20-680 sets forth the percentage classification of "unspecified" disabilities in proportion to total bodily impairment. Subsection 8 sets forth the percentages of total bodily impairment for categories 1--5 of permanent respiratory impairments. No category has assigned to

it the rating of 10%. Category 1 is listed at 0%; category 2 is listed at 15%, and category 3 is listed at 25%.

Under our reading of the Department's rules, it would seem that an award of 10% as compared to total bodily impairment could only be made if it were found that Mr. Dejneka had a category 2 impairment pre-existing the development of his occupational disease, and a category 3 impairment becoming fixed after its development.

The evidence, however, in the record before us in no way suggests that Mr. Dejneka had a pre-existing condition resembling a category 2 respiratory impairment. From our reading of the record, it is difficult to find that Mr. Dejneka's alleged impairment exceeds category 1. The claimant presented the testimonies of his attending physician, Dr. Terry D. Rogers, and that of Dr. Jonathan H. Ostrow. Both Dr. Rogers and Dr. Ostrow, as pointed out by the hearing examiner, are internal medicine specialists with subspecialties in pulmonary diseases. Dr. Ostrow's testimony suggests on direct examination that category 2 may be the appropriate level of impairment. He admits, though, that he had previously reported to the Department that category 1 most closely resembled the condition present in Mr. Dejneka.

Consequently, the record made at the hearing of this appeal does not adequately explain how an award of 10% as compared to total bodily impairment under the existing categories system could result.

We are persuaded from a careful reading of the testimony that Mr. Dejneka's permanent respiratory impairment does most closely resemble that impairment expressed by WAC 296-20-380(1). In so finding, we would have no difficulty in affirming the Department's order had no permanent partial disability award been granted.

The question now becomes whether this Board must raise the disability rating to 15% to correspond to a disability rating (category 2) consistent with the Department's own rules. Or, should the order be set aside to require the claimant to refund the 10% award to the Department to be consistent with Category 1.

Had Washington Iron Works, the employer charged with the cost experience of this claim, appealed from the Department's order or cross-appealed following the claimant's appeal, we would have distinct legal authority and factual basis for reversing the Department's order and requiring a refund of the 10% award. But since the employer has not appealed, we feel compelled to follow the law as expressed in Brakus v. Department of Labor and Industries, 48 Wn. 2d 218 (1956).

That case established the Board of Industrial Insurance Appeals has limited authority as an appeals Board. As we read Brakus, the Board does not have the authority to reverse or set aside an order of the Department allowing a certain percentage for permanent partial disability even though the worker who appealed failed to establish a right to receive any award.

RCW 51.32.080 provides the Department's rules shall have the "force of law". The rules require the percentage ratings for the categories to be followed. It seems from the record before us that the Department has apparently failed to follow the rules which it adopted for granting permanent partial disability awards.

Under the Brakus case, we feel our jurisdiction is limited strictly to the issues raised by the notice of appeal. Those issues do not include whether the Department had authority to enter an order granting a 10% award to Mr. Dejneka, i.e., there is no issue raised by the parties in this appeal questioning the Department's failure to follow its own category system and thereby issuing an order which was void. Since that issue was not raised by the parties in the notice of appeal or during the hearing proceedings, we feel constrained to avoid raising the issue sua sponte.

Also, we cannot see that the award of 10% as compared to total bodily impairment was a payment of benefits which could be recouped under RCW 51.32.240. We cannot find that such payment was made in this case because of clerical error, mistake of identity, innocent misrepresentation, fraud, or any other circumstance of a similar nature.

In essence, although we believe the Department's order granting a permanent partial disability award of 10% as compared to total bodily impairment is erroneous, we do not feel we have the authority to reverse the order to require repayment of such award to the Department. On the other hand, we simply cannot accept that the greatest weight of credible evidence establishes that the claimant has any permanent disability from his occupational disease entitling him to anything other than a category 1 classification. We accept the conclusions of Dr. Rogers that there was really no evidence of any permanent respiratory impairment related to Mr. Dejneka's employment when the claim was closed. Consequently, we cannot accept the conclusion, as counsel for the claimant argues in his petition for review, that Mr. Dejneka is totally permanently disabled. Neither can we propose that Mr. Dejneka's permanent disability award be raised to a level of 15% merely to correspond with a category rating which the Department itself has apparently chosen to ignore.

The hearing examiner's proposed findings 2--6 are adopted as this Board's findings and findings 8 and 9 are hereby renumbered 9 and 10 respectively. The hearing examiner's findings Nos. 1 and 7 are stricken and in its place the Board makes the following findings 1, 7, and 8:

1. On July 22, 1975, the Department of Labor and Industries received an accident report from the claimant, Zotyk Dejneka, alleging the on-set of an occupational disease. On August 15, 1975, the Department issued an order under Claim No. G-764038 allowing the claim for medical treatment and compensation as authorized by law. On October 24, 1977, the Department issued an order closing the claim with a permanent partial disability award equal to 10% as compared to total bodily impairment. On January 31, 1978, the Department issued an order adhering to the provisions of its order dated October 24, 1977. On February 24, 1978, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On March 17, 1978, the Board issued an order granting appeal and directed that proceedings be held on the issues raised by the appeal. Amendments to the claimant's notice of appeal were filed May 5, 1978 an June 27, 1978.

7. As of January 31, 1978, the claimant's permanent respiratory impairment from his disease as related to his employment most closely resembles the description of impairment represented in WAC 296-20-380(1).

8. As of January 31, 1978, the claimant's permanent respiratory impairment did not exceed 10% as compared to total bodily impairment.

In addition, the Board also makes the following conclusions of law:

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

2. As of January 31, 1978, the claimant's permanent partial disability related to his occupational disease filed under Claim No. G-764038 did not exceed 10% as compared to total bodily impairment.

3. The order of the Department of Labor and Industries dated January 31, 1978, effectively closing Mr. Dejneka's claim with a permanent partial disability award of 10% as compared to total bodily impairment should be affirmed.

It is so ORDERED.

Dated this 20th day of August, 1979.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman
/s/_____
AUGUST P. MARDESICH Member

DISSENTING OPINION

The majority of the Board has adopted the hearing examiner's Finding No. 9 as theirs, but have renumbered it No. 10. In my judgment, it is key to this appeal.

> "The claimant is capable of gainful employment on a reasonable basis as a welder provided he uses a respirator."

I am persuaded that the above finding is correct and that it places this claimant in the "odd" lot and "special work" category as per the intent of the Kuhnle case. Kuhnle v. Department of Labor and Industries, 12 Wn. 2d 191 (1942).

The department and/or the employer have not shown that "special work" is available for this claimant. Therefore, the claimant wins the appeal and should be adjudged permanently and totally disabled for the purposes of the Workers' Compensation Act.

Dated this 20th day of August, 1979.

/s/_____
SAM KINVILLE Member