

Canfield, Violet

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Age as factor

Where the worker's age (73), and not her physical impairment resulting from the injury, is the predominant factor impairing her ability to be hired, she cannot be considered permanently totally disabled as a result of the industrial injury.*In re Violet Canfield*, BIIA Dec., 60,811 (1983) [concurrence]

Obtaining work vs. performing work

Whether a worker can obtain work is not a factor in determining whether the worker is permanently totally disabled. The question is whether the worker can perform any substantial gainful employment which exists in the competitive labor market and is within the worker's qualifications.*In re Violet Canfield*, BIIA Dec., 60,811 (1983) [concurrence] [*Editor's Note: See Leeper v. Department of Labor & Indus.*, 123 Wn.2d 803 (1994)]

Scroll down for order.

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

1 **IN RE: VIOLET CANFIELD**)
2)
3 **CLAIM NO. F-897590**) **DOCKET NO. 60,811**
4) **DECISION AND ORDER**

5 APPEARANCES:

6
7 Claimant, Violet Canfield, by
8 Landerholm, Memovich, Lansverk, Whitesides, Wilkinson, Klossner and Perry, per
9 Steven A. Memovich and Kevin G. Staples

10
11 Employer, Crown Zellerbach,
12 None

13
14 Department of Labor and Industries, by
15 The Attorney General, per
16 John R. Dick, Assistant
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18 This is an appeal filed by the claimant on October 26, 1981, from an order of the Department
19 of Labor and Industries (Department) dated October 9, 1981. The order appealed from adhered to
20 the provisions of a prior order closing the claim with a permanent partial disability award equal to a
21 25% loss of function of the left leg above the knee joint with short thigh stump, less previous award,
22 and with time-loss as previously paid. The Department order is **AFFIRMED**.
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PROCEDURAL STATUS AND EVIDENTIARY RULINGS

 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 Department to a Proposed Decision and
Order issued on September 15, 1982, in which the order of the Department dated October 9, 1981
was reversed, and the claim remanded to the Department with instructions to place the claimant on
the pension rolls as a permanently totally disable worker, effective October 9, 1981.

 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
no prejudicial error was committed. Said rulings are hereby affirmed.

CONTENTIONS OF THE PARTIES

 Mrs. Canfield contends that due to the residuals of her 1969 industrial injury, she was
temporarily totally disabled between February 2, 1979 and October 9, 1981. She further contends
that as of October 9, 1981, her condition was in need of further curative treatment. Alternatively, in

1 the event her condition is deemed fixed and medically stationary as of October 9, 1981, Mrs.
2 Canfield asserts she is entitled either to a greater permanent partial disability award for her left leg,
3 hip and knee residuals, or to receive benefits as a permanently totally disabled worker.
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5 The Department counters that the claimant's injury-related condition was fixed as of October
6 9, 1981, and constituted only permanent partial disability which was properly compensated in the
7 Department order closing the claim.
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10 DECISION

11 We agree that the evidence shows the claimant's injury-related condition is fixed and
12 medically stationary as of October 9, 1981. We must disagree with two other conclusions reached
13 in the Proposed Decision and Order. They are: (1) that the issue of Mrs. Canfield's entitlement to
14 time-loss compensation as a temporarily totally disabled worker between February 2, 1979 and
15 October 9, 1981, is not before this Board for resolution, and (2) that the loss of function and
16 physical impairment resulting from her industrial injury of December 15, 1969, considered with her
17 age, education, training and experience, have rendered Violet Canfield unable on a reasonably
18 continuous basis to maintain gainful employment regularly available in the competitive market.
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22 Considering the evidence in this matter, we find the following facts established. Violet
23 Canfield sustained an industrial injury to her left hip, knee and leg on December 15, 1969 during the
24 course of her employment with Crown Zellerbach Corporation. She was treated surgically, by
25 internal fixation of her fractured hip, within the next few days. Early in 1971, a second surgery was
26 performed to remove the fixation device. The claimant's condition improved, and although her
27 treating physician released her for light duty work, the claimant elected to retire in August 1971 at
28 age 62. When claimant Canfield's hip condition worsened some six years after she retired, the
29 Department reopened her claim effective in October 1977, provided further surgical repair (in the
30 form of a total hip replacement) and then closed the claim with an additional permanent partial
31 disability award. The claimant appealed the Department's closing order, and the notice of appeal
32 alleges that she is entitled to relief as follows: "Time-loss, an additional award for disability and/or
33 placed upon the pension rolls of the State of Washington." During pre-hearing proceedings before
34 this Board, Mrs. Canfield effectively amended her notice of appeal to request, as an additional
35 alternative, further curative treatment.
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1 In cases arising under the Industrial Insurance Act, the jurisdiction of this Board is invoked by
2 filing a written notice of appeal which shall set forth the grounds upon which the appealing party
3 considers the order appealed from to be unjust or unlawful, as well as the relief sought. As noted
4 above, Violet Canfield specifically requested relief in the form of time-loss compensation. The
5 closing order dated October 9, 1981 awards "time-loss as paid". Accordingly, despite the
6 limitations imposed by Lenk v. Department of Labor and Industries, 3 Wn. App. 977 (1970), the
7 issue of entitlement to time-loss compensation between February 2, 1979 and October 9, 1981, is
8 properly before this Board.
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10 The issue of Mrs. Canfield's entitlement to intermittent time-loss compensation after February
11 2, 1979 is resolved by reference to the testimony of her treating surgeon, Dr. Joseph Sacamano.
12 Dr. Sacamano testified that his hip replacement surgery in 1978 was successful in improving the
13 claimant's leg disability, and that she "would have been able to return to moderate employment on
14 February 2, 1979". He went on to explain that "I felt that she should not be doing heavy laboring
15 jobs but that there were occupations conceivable for her to carry on". The claimant is therefore not
16 entitled to time-loss compensation for any period after February 2, 1979. Bonko v. Department of
17 Labor and Industries, 2 Wn. App. 22 (1970).
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19 Concerning Mrs. Canfield's entitlement to permanent total disability benefits, it is the
20 judgment of this Board that regardless of the partial disability in her leg, the claimant is physically
21 able to perform regular full-time jobs within her capabilities. The claimant is a 73 year old woman of
22 average intelligence, average mathematical and vocabulary skills, better-than-average articulation,
23 with a high school education and an ability (without retraining) to perform "moderate" work on a
24 reasonably continuous basis, provided she can alternate sitting, standing and walking during an 8-
25 hour work day.
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27 While it is true that Mrs. Canfield's age makes it very unlikely she can obtain any of the
28 several jobs in the competitive labor market which are within her qualifications, this fact is not
29 sufficient. One is permanently totally disabled only if his or her injury-caused impairments are of
30 such severity that he or she is unable to perform any substantial gainful work within his/her
31 qualifications which exists in the competitive labor market. Certainly "age" is a factor to be weighed
32 when superimposed upon the effects of the injury. However, here the claimant's age is the
33 predominant feature impairing her ability to be hired. Her physical impairment from injury is not
34 substantial enough to prevent the performance of gainful employment.
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1 Mrs. Canfield, age 73, retired from the active labor market in 1971 after working
2 approximately 32 years. She is receiving Social Security retirement benefits and has for over 11
3 years. She voluntarily withdrew from the labor market, deservedly and justifiably preferring
4 retirement. She was not, however, forced off the labor market as a result of this industrial injury.
5 She does have significant residual earning capacity insofar as the effect of the injury is concerned.
6 It is simply not the cause of her unemployed status. The overwhelming preponderance of the
7 evidence adduced in this matter demonstrates that the claimant's permanent disability is partial
8 only, and has been properly compensated by the Department.
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10 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto,
11 the claimant's response to the Department's Petition for Review, and a careful review of the entire
12 record before us, we hereby enter the following:
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14 **FINDINGS OF FACT**

- 15 1. On December 15, 1969, while in the course of her employment with
16 Crown Zellerbach Corporation, claimant Violet Canfield injured her left
17 leg, hip and knee when she slipped on some ink and fell. A report of
18 that accident was filed on December 24, 1969. The claim was accepted
19 by the Department, treatment and time-loss compensation were
20 provided, and on September 23, 1971, the Department issued an order
21 closing the claim with a permanent partial disability award equal to 12%
22 loss of function of the left leg at the hip joint.
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24 A timely application to reopen the claim on the ground of aggravation of
25 condition was filed, and on April 24, 1972, the Department issued an
26 order reopening the claim effective January 14, 1972 for treatment to
27 date, and simultaneously closed the claim with no further permanent
28 partial disability award.
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- 30 2. On October 19, 1977, an application to reopen the claim on the ground
31 of aggravation of condition was filed. On January 18, 1978, the
32 Department issued an order reopening the claim for further treatment
33 effective October 25, 1977. By order issued August 21, 1981, the
34 Department closed the claim with time-loss compensation as paid to
35 February 2, 1979, and with a permanent partial disability award equal to
36 25% of the loss of function of the left leg above the knee joint with short
37 thigh stump, less the prior award. A timely request for reconsideration
38 to that order caused the Department to hold the August 21, 1981
39 determination in abeyance. On October 9, 1981, the Department issued
40 an order adhering to its previous order. On October 26, 1981, the
41 claimant filed a notice of appeal with the Board of Industrial Insurance
42 Appeals. On November 4, 1981, the Board issued an order granting the
43 appeal, and directed that proceedings be held on the issues raised by
44 the appeal. skills, better-than-average articulation, with a high school
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1 education and an ability, without retraining, to perform moderate work on
2 a reasonably continuous basis, provided she can continuously alternate
3 sitting, standing and walking during an 8-hour work day. Mrs. Canfield
4 has worked for 16½ years as a bag inspector, a job which requires an
5 individual to walk and stand and sit as well as lift. She also worked for
6 16 years as a bag tender, a job which involves standing for long periods
7 of time.

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9 4. As a result of her industrial injury on December 15, 1969, claimant
10 Canfield developed a condition diagnosed as aseptic necrosis of femoral
11 head of the left hip.
- 12 5. Between February 2, 1979 and October 9, 1981, claimant Canfield was
13 capable of performing gainful employment which is within her
14 qualifications and available in the competitive labor market, on a
15 reasonably continuous basis.
- 16 6. As of October 9, 1981, the claimant's condition causally related to her
17 industrial injury was fixed no further curative treatment was indicated or
18 required.
- 19 7. As of October 9, 1981, claimant Canfield exhibited partially disabling
20 impairment in her left lower extremity resulting from the December 15,
21 1969 injury. That permanent loss of physical function did not exceed
22 25% loss of function of the left leg above the knee joint with short thigh
23 stump.
- 24 8. As of October 9, 1981, Violet Canfield was capable of performing gainful
25 employment, which is within her qualifications and available in the
26 competitive labor market, on a reasonably continuous basis.
- 27 9. The claimant retired from the labor market in 1971 at age 62, and has
28 remained in such retirement status ever since.

31 **CONCLUSIONS OF LAW**

32 Based upon the foregoing findings of fact, this Board concludes as follows:

- 33 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
34 and subject matter of this appeal.
- 35 2. Between February 2, 1979 and October 9, 1981, the claimant was not
36 temporarily totally disabled within the purview of the Workers'
37 Compensation Act, and therefore, was not entitled to payment of time-
38 loss compensation during that period.
- 39 3. As of October 9, 1981, claimant Canfield exhibited a permanent partial
40 disability in her left lower extremity resulting from the injury of December
41 15, 1959, equal to 25% loss of function of the left leg above the knee
42 joint with short thigh stump.
- 43 4. As of October 9, 1981, claimant Canfield was not a permanently totally
44 disabled worker within the purview of the Workers' Compensation Act.

1 5. The order of the Department of Labor and Industries dated October 9,
2 1981, which closed Mrs. Canfield's claim with time-loss compensation
3 as paid to February 2, 1979, and with a permanent partial disability
4 award equal to 25% loss of function of the left leg above the knee joint
5 with short thigh stump, less prior award, is correct and should be
6 affirmed.

7 It is so ORDERED.

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9 Dated this 24th day of January, 1983.

10 BOARD OF INDUSTRIAL INSURANCE APPEALS

11
12 /s/ _____
13 MICHAEL L. HALL Chairman

14
15 /s/ _____
16 PHILLIP T. BORK Member

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18 **CONCURRING OPINION**

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20 If Mrs. Canfield had not voluntarily retired from the active labor market in 1971, it would be my
21 opinion that she would be deserving a pension based upon her age (73). It is important to
22 remember that age is a factor to be considered in the employability of a person.

23
24 Is it realistic to assume that employers are going to hire a worker who has reached the age of
25 73 regardless of whether they had previously been injured on the job? Therefore age does play an
26 important role in determining the employability of a worker forced off a job by an industrial injury. I
27 would concur with the conclusions of law reached by the majority of the Board.

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29 Dated this 24th day of January, 1983.

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