Heaton, Harold

STAYS ON APPEAL

Effect of appeal to superior court on Department's authority to take further action on claim

In the absence of a court order staying the implementation of a Board order affirming a Department order reopening the claim, the Department may take further action on the claim while the employer's appeal is pending in superior court and may issue an order determining that the worker is permanently totally disabled. ***….In re Harold Heaton*, BIIA Dec., 68 701 (1986)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: HAROLD N. HEATON	)	**DOCKET NO. 68,701**
	)	
CLAIM NO. F-434750	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Harold N. Heaton, by
Stiley & Kodis, per
Patrick K. Stiley

Employer, Kaiser Aluminum and Chemical Corporation, by
Rolland & O'Malley, per
Wayne L. Williams and Thomas O'Malley

Department of Labor and Industries, by
The Attorney General, per
Donna L. Walker and Mike Flynn, Assistants

This is an appeal filed by the employer on September 13, 1984 from an order of the Department of Labor and Industries dated July 18, 1984 which adhered to the provisions of an order dated April 19, 1984 wherein the Department placed the claimant, Harold Heaton, on the pension rolls as a permanently totally disabled worker effective October 1, 1982. The Department order is **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 employer to a Proposed Decision and Order issued on September 13, 1985 in which the order of the Department dated July 18, 1984 was affirmed.

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

The issue raised by this employer's appeal, and on which the parties presented all their evidence, is whether the claimant is permanently totally disabled as of October 1, 1982 due to his industrial injury of June 14, 1966. The Proposed Decision and Order adequately discussed the evidence and reached the proper result, i.e., affirmance of claimant's pension status.

We granted review to comment on the Department's authority to award a pension while the employer still has an appeal pending in Superior Court from a prior order of August 4, 1981, finding aggravation of condition since previous claim closure in April 1970 and reopening the claim for treatment and other action as indicated. The Board decided in a prior appeal, (Docket No. 60,635,

Board Decision of 10/27/82) that the Department properly reopened Mr. Heaton's claim by its order of August 4, 1981, for further treatment and other action because of an aggravation of the condition causally related to the 1966 industrial injury. The employer appealed from that decision to the Superior Court on November 8, 1982, and that matter is still pending in Court.

In Reid v. Department of Labor and Industries, 1 Wn. 2d. 430 (1939), a claimant had filed an aggravation application to reopen his claim while his appeal from the original closing order was still pending in Superior Court. The Supreme Court held that the claim for aggravation of condition could not be entertained until a final determination was made as to the amount of the award to which the worker was entitled on the first closing date. The Court reasoned that logically a prerequisite basis for adjudicating whether an aggravation has occurred, is a determination of what the extent of the condition was on the first date so as to have something to compare.

Reid is distinguishable from the present case where the issue now before us is not a claim for aggravation, and the Department can logically adjudicate the issue of the extent of Mr. Heaton's permanent disability independent from the issue pending in Superior Court of whether Mr. Heaton's claim should have been reopened by the Department. The Department clearly has the jurisdiction to adjudicate Mr. Heaton's claim. Part of the adjudicating process is the Department's determination of when and whether an injured worker has reached the status of permanent total disability. In Lee v. Jacobs, 81 Wn. 2d. 937 (1973), the Supreme Court held that pursuant to RCW 51.52.110, implementation of orders of the Board are not automatically stayed pending Court appeal, but may be stayed in the Court's exercise of inherent discretion. The Board decided in Docket No. 60,635 that the claim was properly reopened because of an aggravation of Mr. Heaton's condition. Absent a Court stay against any administrative implementation of that decision, (and this record does not disclose such) the Department has acted within its adjudicatory authority in now closing Mr. Heaton's claim and awarding a pension, despite the employer's appeal in Docket No 60,635 still pending in Superior Court. Furthermore, the Board's jurisdiction to now hear the employer's appeal on the issue of whether Mr. Heaton was properly (placed on a pension is not affected by the pending appeal.)

After consideration of the Proposed Decision and Order of September 13, 1985, the employer's Petition for Review therefrom, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

The Proposed findings, conclusions, and order are hereby adopted as this Board's final findings, conclusions, and order and incorporated herein by this reference.

It is so ORDERED.

Dated this 14th day of April, 1986.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/

GARY B. WIGGS Chairperson

/s/

FRANK E. FENNERTY, JR. Member

DISSENTING OPINION

I recognize the persuasive nature of the holding in Lee v. Jacobs, 81 Wn.2d 937, as to why the Department has the authority, and this Board has the jurisdiction, to now decide the permanent total disability issue, in spite of the fact that the question of whether this claim should have been reopened in 1981 at all or for any purpose is still an open question in view of the employer's pending appeal from the Board's decision of October 27, 1982 under Docket 60,635. (Incidentally, this Board member was not a participant in that particular decision).

I also recognize that differences in procedure and factual issues exist between this case and Reid v. Department of Labor and Industries, 1 Wn.2d 430. However, analogizing from Reid, until a final determination is made in the other pending litigation as to whether this claim should have been reopened at all for aggravation, there is logically no basis for reaching the issue of extent of permanent disability. At the very least, a final adjudication in the other action that the claim should not have been reopened could create an administrative nightmare for the Department in attempting to terminate the claim with the rights of all parties intact.

Nevertheless, given the present posture of this appeal, the only issue put squarely before us is whether the claimant is permanently totally disabled as of October 1, 1982 as a result of his June 14, 1966 injury. Our industrial appeals judge and the Board majority answer this question in the affirmative. I do not.

In order to support a conclusion of permanent total disability, the physical capacity restrictions placed on Mr. Heaton on January 25, 1984 by Dr. Robert Bathurst (who categorized himself as

somewhat of a specialist or consultant in chronic pain management) would have to be accepted. The Board majority has in fact accepted those restrictions completely, in Finding No. 4. I cannot do so. Dr. Bathurst's activity restrictions are markedly more limiting than the physical capacity restrictions arrived at by the Spokane medical panel (Dr. J. B. Watkins, orthopedist, Dr. R. A. Wetzler, neurologist, and Dr. J. S. Blaisdell) on February 2, 1984. Furthermore, Dr. Francis M. Brink, an orthopedic specialist with knowledge of the claimant's back conditions as a periodic attending physician over a long period of time, February of 1967 through December of 1981, completely agreed with the less severe activity restrictions of the Panel examiners.

Based on Dr. Bathurst's restrictions, vocational rehabilitation specialist Michael Hulen testified that Mr. Heaton could not engage in any full-time gainful employment. However, based on the lesser restrictions of Drs. Watkins, Wetzler, Blaisdell, and Brink, Mr. Hulen was of the opinion that the claimant could engage in regular gainful employment of a lighter nature. In view of the clearly greater expertise of these four doctors as compared to Dr. Bathurst's uncertain qualifications, I would conclude the claimant is not unemployable due to residuals of his 1966 injury.

Added to the foregoing considerations are the facts that, except for a brief period immediately following the June 14, 1966 injury, and for several months in 1969 while undergoing and recuperating from his L3-4 and L4-5 discectomy surgery, the claimant was not again off work because of his back disability until the spring of 1981. It is clear that his overall back impairment was more advanced by that time, but it is also clear to me that such worsening was just partly related to the residuals of the injury and was primarily due to natural progression with age of his severe degenerative osteoarthritic condition throughout his entire lumbar spine (See Exhibit 1, the panel examination report of February 2, 1984). Mr. Heaton has not worked since March 1981, and from then until September 1982 was on sick leave (no doubt because his status during that time was considered by the employer to be non-industrially caused rather than industrial-injury caused).

Finally, it was stipulated by the parties that as of September 1982 Mr. Heaton applied for and received a pension under the company's retirement pension program; and the record also establishes that he is drawing Social Security disability benefits.

Mr. Heaton is certainly entitled to his retirement benefits based on some 36 years of service with Kaiser. Also, Social Security disability benefits are no doubt justified, since such benefits are based on a person's overall total disability, regardless of the source or cause of any and all impairments making up that total disability. But is the claimant also entitled to pension benefits under

the workers' compensation act? I do not believe so, because based on the overwhelming weight of the evidence, he has not been rendered permanently totally disabled as of October 1, 1982 (or at any time since he stopped working in March 1981) as a proximate result of his June 14, 1966 industrial injury.

I would reverse the Department's pension order of July 18, 1984.

Dated this 14th day of April, 1986.

/S/________________________________
PHILLIP T. BORK, Member