

Sulgrove, Roy

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Award after pension determination

Although on the pension rolls under one claim, a worker is not precluded by law from receiving an award for permanent partial disability under another claim if the condition covered under that claim was fixed and stable prior to the date the worker was placed on a pension.*In re Roy Sulgrove*, BIIA Dec., 88 0869 (1989)

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Permanent partial disability award under another claim

Although on the pension rolls under one claim, a worker is not precluded by law from receiving an award for permanent partial disability under another claim if the condition covered under that claim was fixed and stable prior to the date the worker was placed on a pension.*In re Roy Sulgrove*, BIIA Dec., 88 0869 (1989)

Scroll down for order.

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

1 **IN RE: ROY T. SULGROVE**)
2)
3 **CLAIM NO. J-719185**)
4)
 DOCKET NO. 88 0869
 DECISION AND ORDER

5 APPEARANCES:

6
7 Claimant, Roy T. Sulgrove, by
8 Crumb & Casey, P.S., per
9 C. Mark Casey

10
11 Employer, Various, by
12 None

13
14 Department of Labor and Industries, by
15 The Attorney General, per
16 Dennis J. Beemer, Assistant

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18 This is an appeal filed by the claimant, Roy T. Sulgrove, on March 4, 1988 from an order of the
19 Department of Labor and Industries dated January 4, 1988. The order recited that the claimant was
20 classified as permanently and totally disabled and placed on the pension rolls of the Department by
21 order dated September 4, 1987 under Claim No. H-731884; recited further that the claimant is no
22 longer entitled to awards for temporary partial, temporary total or permanent partial disability under
23 Claim No. J-719185 as a result of having been placed on the pension rolls; and adhered to the
24 provisions of the Department order dated November 2, 1987, which closed this claim with allowance
25 for medical treatment only. The Department order is **REVERSED AND REMANDED**.
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30 **DECISION**

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32 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
33 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
34 issued on September 15, 1988, in which the order of the Department dated January 4, 1988 was
35 affirmed.
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38 The issue in this appeal cannot be accurately understood without a brief recitation of the facts
39 as stipulated by the parties. On July 18, 1980 Mr. Sulgrove sustained an industrial injury. He filed a
40 claim which was assigned Claim No. H-731884 and allowed. On September 4, 1987, the Department
41 issued an order placing Mr. Sulgrove on the pension rolls in Claim No. H-731884 as a result of that
42 industrial injury.
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45 Seventeen months earlier, on March 31, 1986, Mr. Sulgrove had submitted an application for
46 benefits based on an asbestos-related occupational disease. This claim was assigned Claim No.
47

1 J-719185. It was not until September 15, 1987, eleven days after Mr. Sulgrove had been placed on a
2 pension in Claim No. H-731884, and more than 17 months after he had filed his claim in Claim No.
3 J-719185, that the Department issued its first order in this latter claim. Within six days of receiving the
4 September 15, 1987 order allowing the claim for asbestosis, Mr. Sulgrove's attorney requested closure
5 of this claim with a permanent partial disability award. However, on November 2, 1987, the
6 Department issued an order closing the claim with allowance for medical treatment only.
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10 Following a timely protest from claimant's counsel of the November 2, 1987 order, the
11 Department issued the order which is the subject of this appeal, again closing the claim with medical
12 treatment only. It is the Department's position that, because Mr. Sulgrove was placed on a pension in
13 Claim No. H-731884 on September 4, 1987, he cannot legally receive any award for "temporary
14 partial, temporary total or permanent partial disability under Claim No. J-719185."
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18 The parties have explicitly limited the issue on appeal to the legal determination of whether Mr.
19 Sulgrove may receive a permanent partial disability award under Claim No. J-719185 in addition to his
20 pension under Claim No. H-731884. If we conclude that he is not legally precluded from receiving
21 both, then the parties have agreed that the claim should be remanded to the Department to consider
22 and determine whether Mr. Sulgrove in fact sustained a permanent partial disability as a result of his
23 asbestosis.
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27 The Proposed Decision and Order relies on Sorenson v. Department of Labor and Industries,
28 19 Wn. 2d 571 (1943) and Harrington v. Department of Labor and Industries, 9 Wn. 2d 1 (1941) to
29 affirm the Department order. The Proposed Decision and Order accurately describes those decisions,
30 but incorrectly states that "[t]he situation presented here is no different. . . ."
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32
33 Both Harrington and Sorenson involved workers who were placed on the pension rolls and
34 thereafter returned to gainful employment. Both sustained further industrial injuries subsequent to
35 being declared permanently and totally disabled. Both sought additional time-loss compensation or
36 pension payments as a result of the subsequent injuries.
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39 As noted in the Proposed Decision and Order, the Supreme Court concluded that neither Mr.
40 Sorenson nor Mr. Harrington could receive further compensation in the form of time-loss
41 compensation or pension payments as a result of the subsequent industrial injuries which they
42 sustained after they were classified as permanently totally disabled. The Supreme Court reached this
43 result to avoid "an overlapping of classifications" and "the allowance of double payment." Harrington,
44 at 8. Neither Harrington nor Sorenson involved a request for a permanent partial disability award for
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1 the subsequent injury. However, contrary to the assertions of claimant's counsel, that distinction
2 standing alone would not be dispositive. Sorenson, at 578.

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4 Mr. Sulgrove became permanently totally disabled as a result of the industrial injury of July 18,
5 1980 covered by Claim No. H-731884, as of September 4, 1987. Obviously, from and after that date
6 he cannot receive temporary or permanent total disability compensation under Claim No. J-719185.
7 Furthermore, if his asbestosis condition under Claim No. J-719185 was not fixed and stable and
8 productive of a permanent partial disability until after September 4, 1987, then, under the reasoning of
9 Harrington and Sorenson, he would also be precluded from receiving a permanent partial disability
10 award. If, on the other hand, his condition under Claim No. J-719185 was fixed and stable and
11 productive of a permanent partial disability prior to September 4, 1987, there appears to be no reason
12 in the law why he should not be entitled to a permanent partial disability award therefor. Harrington
13 and Sorenson do not dictate otherwise. There would be no "double payment" or "overlapping of
14 classifications" if Mr. Sulgrove in fact had sustained a permanent partial disability as a result of his
15 asbestos-related condition prior to September 4, 1987. The fact that he might not be actually paid for
16 that pre-existing permanent partial disability until after he was placed on a pension in a different claim
17 seems to us to be irrelevant.

18
19 Furthermore, RCW 51.32.210 requires the Department to act "promptly" on claims. From the
20 record before us, it does not appear that the Department took any action on this claim until more than
21 17 months after it was filed. The mere passage of time and administrative delay should not operate to
22 deprive Mr. Sulgrove of his potential entitlement to a permanent partial disability award for his
23 asbestosis, if he was in fact permanently partially disabled prior to September 4, 1987. That is, if Mr.
24 Sulgrove was entitled to a permanent partial disability under Claim No. J-719185 prior to September 4,
25 1987, which the Department failed to promptly pay, the Department cannot be relieved of that
26 obligation solely because Mr. Sulgrove is now on the pension rolls under Claim No. H-731884.

27
28 Furthermore, since the Department closed the J claim on November 2, 1987, it obviously
29 concluded that Mr. Sulgrove's asbestosis condition was fixed as of that date. Otherwise, under
30 Harrington, the claim would have been kept open for the provision of further appropriate medical
31 treatment. It would seem likely that Mr. Sulgrove's asbestosis condition was also fixed two months
32 earlier, before he was placed on a pension in Claim No. H-731884. At any rate, the Department will
33 have to resolve that question on remand.

1 The Department order on appeal is incorrect insofar as it determines as a matter of law that Mr.
2 Sulgrove is not entitled to a permanent partial disability award in Claim No. J-719185 regardless of
3 when his condition under this claim became fixed. The claim is remanded to the Department with
4 direction to determine when Mr. Sulgrove's occupational disease condition became fixed and stable. If
5 such condition was in fact fixed prior to September 4, 1987, the Department is to determine the extent
6 of permanent partial disability attributable to that condition, if any, and pay claimant that award.
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10 **FINDINGS OF FACT**

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- 12 1. On March 31, 1986, the Department of Labor and Industries received an
13 accident report from the claimant, Roy T. Sulgrove, alleging the
14 contraction of an occupational disease during the course of his
15 employment with various employers subject to the Industrial Insurance
16 Act. On September 15, 1987, the Department issued an order allowing
17 the claim for asbestosis, and denying responsibility for conditions
18 described as emphysema and obstructive lung disease.
19
20 On November 2, 1987 the Department issued an order closing the claim
21 with allowance for medical treatment only. On December 21, 1987, the
22 Department received a protest and request for reconsideration from the
23 claimant of its order of November 2, 1987, specifically requesting
24 consideration of a permanent partial disability award. On January 4, 1988,
25 the Department issued an order adhering to the provisions of its order
26 dated November 2, 1987, and ordering that the claimant is no longer
27 entitled to award for temporary partial, temporary total or permanent partial
28 disability under this claim as a result of having been placed on the pension
29 rolls on September 4, 1987 under Claim No. H-731884.
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31 On March 4, 1988 the Board of Industrial Insurance Appeals received a
32 notice of appeal from the claimant of the Department order of January 4,
33 1988; Docket No. 88 0869 was assigned. On April 1, 1988 the Board
34 issued an order granting the appeal and directing that proceedings be held
35 on the issues raised in the notice of appeal.
 - 36 2. On July 18, 1980, Roy T. Sulgrove sustained an industrial injury, which
37 was allowed by the Department of Labor and Industries and assigned
38 Claim No. H-731884. On September 4, 1987, the Department issued an
39 order classifying Mr. Sulgrove as totally and permanently disabled within
40 the meaning of the Industrial Insurance Act under Claim No. H-731884,
41 due to the conditions proximately caused by his industrial injury of July 18,
42 1980.
 - 43 3. Mr. Sulgrove filed the claim for benefits in Claim No. J-719185 on March
44 31, 1986, approximately 17 months before the Department classified him
45 as totally and permanently disabled under Claim No. H- 731884. The
46 Department determined that his asbestosis condition under Claim No.
47 J-719185 was fixed and stable at least as of November 2, 1987 when the

1 claim was first closed with allowance for medical treatment only. The
2 Department has not yet determined whether Mr. Sulgrove's asbestosis
3 condition was fixed prior to September 4, 1987 or whether it was then
4 productive of any permanent partial disability.
5

6 **CONCLUSIONS OF LAW**

- 7 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
8 and the subject matter to this appeal.
9
10 2. The claimant is entitled to an award for permanent partial disability under
11 Claim No. J-719185 if his asbestosis condition was fixed and stable before
12 September 4, 1987 and if that condition was productive of a permanent
13 partial disability prior to September 4, 1987.
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15 3. The order of the Department of Labor and Industries dated January 4,
16 1988 that adhered to the provisions of an order dated November 2, 1987,
17 which closed this claim with allowance for medical treatment only, and
18 determined that the claimant is no longer entitled to awards for temporary
19 partial, temporary total or permanent partial disability under this claim as a
20 result of having been placed on the pension rolls under Claim No.
21 H-731884, is incorrect and is reversed and this matter is remanded to the
22 Department with direction to determine when claimant's asbestosis
23 condition became fixed and whether any permanent partial disability
24 resulted therefrom prior to September 4, 1987, and if so, to pay the
25 claimant the appropriate award for permanent partial disability and to
26 thereupon close the claim.

27 It is so ORDERED.

28 Dated this 1st day of May, 1989.

29 BOARD OF INDUSTRIAL INSURANCE APPEALS

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31
32 /s/
33 SARA T. HARMON Chairperson

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36 /s/
37 FRANK E. FENNERTY, JR. Member

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40 /s/
41 PHILLIP T. BORK Member
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