Calhoon, Twila

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Temporomandibular joint

Temporomandibular jaw [TMJ] injury may result in permanent impairment which warrants payment of a permanent partial disability award. Where the worker's TMJ injury negatively impacted both jaw and cervical spine function, an appropriate disability rating must include consideration of the joint itself as well as related areas -- including cervical spine, speech, dental health, digestion and headache -- where function is diminished. ***…In re Twila Calhoon*, BIIA Dec., 92 5813 (1994)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: TWILA J. CALHOON	)	**DOCKET NO. 92 5813**
	)	
CLAIM NO. J-486699	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Twila J. Calhoon, by
Casey & Casey, P.S., per
Gerald L. Casey, Attorney

Employer, Alderbrook Inn Resort, by
None

Department of Labor and Industries, by
Office of the Attorney General, per
Lisa Daeley Kelly, Assistant

This is an appeal filed by the claimant, Twila J. Calhoon, on October 14, 1992 from an order of the Department of Labor and Industries dated October 7, 1992 which closed the claim with time loss compensation as paid. In closing the claim, the order held for naught the Department's overpayment order of July 6, 1992 and paid awards for permanent partial disability equal to Category 2 of WAC 296-20-240 for permanent cervical spine impairment and 8% of total bodily impairment for permanent temporomandibular joint impairment. **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.51.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the Department of Labor and Industries to a Proposed Decision and Order issued on August 12, 1993 in which the order of the Department dated October 7, 1992 was reversed and the matter remanded to the Department with directions to pay the claimant an award for permanent partial disability consistent with 75% as compared to total bodily impairment, less prior awards, if any, and to pay the claimant time loss compensation benefits for the period of time from October 2, 1991 through October 7, 1992 inclusive.

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 issues raised by this appeal are several. 1) Was the claimant temporarily totally disabled from November 25, 1991 to October 7, 1992 as a causal result of her industrial injury? 2) As of October 7, 1992, were the claimant's conditions causally related to the industrial injury of September 28, 1984 fixed and stable? 3) If Ms. Calhoon's conditions were fixed, what was the extent of her

disability, if any? Ms. Calhoon specifically alleges that as of October 7, 1992, she was a totally permanently disabled worker within the meaning of the Industrial Insurance Act.

Of the above issues, we chose to first address the question of permanent total disability. Our review of the record fails to reveal where the claimant presented adequate evidence to support her assertion that she is totally permanently disabled. To the contrary, it appears that this matter was visited for the first time in the claimant's Petition for Review after the close of the record. There is no medical or vocational testimony indicating that the claimant is permanently totally disabled. At best, Dr. Ralph Merrill's testimony supports the conclusion that Ms. Calhoon was temporarily totally disabled. However, that evidence is not sufficient to support a claim for total disability benefits and we conclude, therefore, that Ms. Calhoon was not permanently totally disabled as of the date of the order closing the claim.

Turning then to the issue of temporary total disability, we find that Ms. Calhoon established by a preponderance of the credible evidence that she was temporarily totally disabled from November 25, 1991 to October 7, 1992. Dr. Ralph Merrill, a certified specialist in oral maxillofacial surgery, treated Ms. Calhoon for her temporomandibular joint pain beginning in 1988 and continuing through February 1993. As Ms. Calhoon's treating physician, he performed multiple surgeries in September of 1988, January 1990, March 1990, September 1991 and December 1991. Given Dr. Merrill's credentials and long term contact with Ms. Calhoon, as well as his first hand surgical observation of her jaw condition, we are persuaded that he is in an excellent position to comment on whether Ms. Calhoon was employable. In this regard, his opinions are reasonably clear in that Ms. Calhoon was neither capable of working in late 1991 nor capable of working as of October 7, 1992. 6/7/93 Tr. at 24, 52. We find Dr. Merrill's opinions in this regard to be persuasive and conclude that Ms. Calhoon was temporarily totally disabled during the period in question.

A more difficult question is presented as to whether Ms. Calhoon's condition was fixed and stable as of October 7, 1992. In reviewing the entirety of the record, we note that Dr. Merrill states at two points in his testimony that Ms. Calhoon's condition is not fixed. In general terms, he believes that she is gradually worsening and will eventually have to have further surgery. However, considering his testimony at length, we see that he has no immediate recommendations and is reluctant to treat Ms. Calhoon any further, having exhausted all reasonable modalities of care as of October 7, 1992. Furthermore, Dr. Merrill goes on in his testimony to render an opinion as to the extent of Ms. Calhoon's permanent partial disability. In doing so, he acknowledges that Ms. Calhoon's condition is fixed

sufficiently to the extent that her permanent impairment is capable of being determined so that a disability award could be considered. This is consistent with and supports the opinion of Dr. Ralph Zech, who testified that Ms. Calhoon's condition was medically fixed and stable as of the date of the Department's order of October 7, 1992.

Turning now to the question of permanent partial disability, both Dr. Merrill and Dr. Zech have given opinions as to the percentage of permanent partial disability that best describes Ms. Calhoon's residual impairment. Given the remarkable, nearly ten-fold difference in the amount of disability as expressed by the two physicians, the issue is not whether Ms. Calhoon has a permanent disability but, rather, the most accurate rating, based on all the evidence.

Washington law has long recognized that an attending physician is normally better qualified to give an opinion as to the patient's disability than a doctor who has seen and examined the patient once. Spalding v. Dep't of Labor & Indus., 29 Wn.2d 115 (1947); Groff v. Dep't of Labor & Indus., 65 Wn.2d 35 (1964); Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569 (1988). Applied to the case at hand, it would seem that Dr. Merrill's opinion should be accepted outright inasmuch as he has had both frequent contact and direct responsibility for treating Ms. Calhoon. Dr. Merrill stated that Ms. Calhoon's temporomandibular joint condition is best represented by a permanent partial disability rating of 75% as compared to total bodily impairment. That is a strikingly large disability rating. For comparison purposes with other kinds of impairments at similar percentage levels, the amputation value of a leg, for example, above the knee joint with short thigh stump is 60% as compared to total bodily impairment. The loss of an arm by disarticulation at the shoulder is 57% as compared to total bodily impairment. Total loss of hearing is 48%. Loss of an eye is 24%. Thus, a conclusion that Ms. Calhoon has a disability equal to 75% as compared to total bodily impairment should demonstrate a significant loss of bodily function comparable to the other described conditions at similar levels of disability. While we readily acknowledge Ms. Calhoon's impairments, they do not appear to us to represent a level of disability as high as that arrived at by Dr. Merrill.

The problem faced by Dr. Merrill is that permanent partial disability impairments of the temporomandibular joint are not included in either the category rating system as promulgated by the Department of Labor and Industries or the specified disabilities as outlined in RCW 51.32.080. RCW 51.32.080(2) provides that compensation for an unspecified disability shall be measured and compared to total bodily impairment and shall be in proportion, as nearly as possible, to the specified disability that it most closely resembles and approximates. Despite the language found in section (2),

we recognize that Dr. Merrill had little real guidance as to the percentage of impairment that might appropriately describe Ms. Calhoon's impairment.

In focusing greater attention on Dr. Merrill's impairment rating, we note that his percentages do not appear to accurately nor consistently reflect 75%. By our reading of his testimony at pages 31-35 of the transcript dated June 7, 1993, Dr. Merrill seems to have initially come up with a disability rating of either 84% or 90% of total bodily impairment, depending on how his testimony is interpreted. At pages 51-52 of his testimony, his calculations appear to fairly clearly total 84%. However, when stating his ultimate opinion, he said that Ms. Calhoon's disability was 75% of total bodily impairment. Then to confuse matters, he said that because her condition had worsened, Ms. Calhoon's disability should have been rated at 94% of total bodily impairment. Due to this confusion, we are left to conclude that Dr. Merrill's opinion of disability is not reliable in this instance. Part of Dr. Merrill's difficulty is that he appears to have taken a cumulative approach to rating permanent partial disability, adding on additional percentages for each of the several surgeries that Ms. Calhoon underwent without focusing on the totality of the underlying permanent impairment. By his method, an individual would receive a greater award after five surgeries than after only one, even though multiple surgeries might have served to not only reduce permanent disability, but also to improve bodily function. There is no support in the law for a rating technique that credits a disability award each time a medical treatment, such as surgery, is undertaken.

Unfortunately, the approach taken by Dr. Zech, who testified at the request of the Department of Labor and Industries, is not a great deal better. In stating his opinion that Ms. Calhoon's disability was best described by an 8% rating, Dr. Zech acknowledged that he knew little about the rating system he had used and was not in a position to defend it. The record is reasonably clear that Dr. Zech did not know whether the system had been adopted by the American Medical Association. To the contrary, it appears that it had not been. Furthermore, at the time of the hearing, the system used by Dr. Zech had not been promulgated into a formal Washington Administrative Code section by the Department of Labor and Industries. Although prepared for the American Association of Oral and Maxillofacial Surgeons by the Committee on Health Care Programs, the rating system does not presently rise to the dignity of law in the state of Washington.

Until either the state Legislature drafts specific legislation addressing permanent temporomandibular joint disabilities or the Department of Labor and Industries promulgates specific

Washington Administrative Code sections dealing with the impairment, we will be required to follow the provisions of RCW 51.32.080(2):

> Compensation for any other permanent partial disability not involving amputation shall be in the proportion which the extent of such other disability, called unspecified disability, shall bear to that above specified, which most closely resembles and approximates in degree of disability such other disability, compensation for any other unspecified permanent partial disability shall be in an amount as measured and compared to total bodily impairment.

In reviewing the record, we note that Dr. Zech found diminished motion of the jaw during up and down movement of the jaw, diminished side to side excursive movement, and diminished forward and back protrusive movement. He observed surgical scars from Ms. Calhoon's several surgeries and crepitus, or grating noise, in the temporomandibular joint on the right. He noted that the mandibular condyle on the right had degenerated such that he was unable to feel the condyle during examination. X-ray studies appeared as though moths were eating away at the bone. He found limited range of motion of the cervical spine in flexion, extension and lateral bending and observed bilateral impairment of the auriculotemporal nerve. Dr. Merrill confirmed Dr. Zech's findings. In addition, he found roughening, irregularities, degenerative deformities, adhesions, and osteophyte formation in the temporomandibular joint which caused Ms. Calhoon to experience myofascial pain in the jaw and cervical spine as well as disabling headache pain. He confirmed that she had, to use his words, "a horrible noise" in her right jaw with chewing and talking. He restricted Ms. Calhoon to lifting no more than 20 pounds and indicated that she should avoid yawning and similar motions that would require her to open her jaw widely. He restricted her eating so as to avoid hard foods. He stated that she should avoid all bumps and trauma to the jaw and believed that she was severely disabled because of frequent severe pain and headaches.

Given the above, we recognize that Ms. Calhoon's temporomandibular joint injury negatively impacts both her jaw and cervical spine function. She is unable to lift, look and turn as she did before her injury. She is limited in her ability to speak, chew or engage in many activities that might result in a bump or jarring of her jaw. She often suffers from myofascial pain and headache which are, in and of themselves, temporarily disabling. With this in mind, we believe that an appropriate disability rating for the temporomandibular joint must necessarily include consideration of the joint itself as well as those related areas whose function is diminished. The related areas may include, but are not necessarily

limited to, the cervical spine, speech, dental health, digestion, headache and a variety of other conditions.

Permanent impairments of the cervico-dorsal spine are rated according to WAC 296-20-240 by reference to which of the five enumerated categories best describes a worker's condition. Category 5, for example, is equal to 35% of total bodily impairment. Similarly, permanent impairments of the upper digestive tract, stomach, esophagus, or pancreas are rated according to WAC 296-20-500 by reference to the five categories contained therein. A Category 5 under WAC 296-20-500 is equal to 60% of total bodily impairment. Permanent speech impairments are rated according to WAC 296-20-460 and the six categories enumerated thereunder. A Category 6 of WAC 296-20-460 is equal to 35% of permanent bodily impairment. Permanent air passage impairments are rated according to WAC 296-20-400 with a Category 6 impairment being equal to 60% of total bodily impairment.

Our point in outlining the above is to recognize the percentages of disability compared to total bodily impairment and acknowledge that permanent impairments of the temporomandibular joint may directly or indirectly relate to each item. Recognizing that jaw function impacts on the ability to speak, chew, swallow, laugh and yawn, as well as the cervical spine and the ability to lift, look and turn, we might well conclude that a permanent impairment of the temporomandibular joint could fall within the range of 35-60% of total bodily impairment. However, we note that Ms. Calhoon retains a diminished ability to speak, chew and lift that would make such an award excessive. Given the ratings made by the physicians who testified here, and after consideration of the established ratings for related areas of the body, we conclude that Ms. Calhoon's jaw disability is best described by 30% of total bodily impairment. Until such time as a specific WAC section is promulgated or the legislature provides statutory direction that would lead us to conclude otherwise, we find that the above rating is an accurate reflection of the permanent partial disability she has experienced as a result of her industrial injury of September 28, 1984.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we make the following:

FINDINGS OF FACT

1. On October 8, 1984, the Department received an application for benefits alleging that Twila J. Calhoon sustained an injury on September 28, 1984.

   The claim was accepted and benefits provided.

   On October 14, 1992, the claimant filed a Notice of Appeal from the Department's order dated October 7, 1992, which set aside and held for

naught the Department's overpayment order dated July 6, 1992 and closed the claim with time loss compensation as paid and with an award for permanent partial disability consistent with Category 2 cervical impairment and 8% for the temporomandibular joint condition; compensation for unspecified disabilities of 18% as compared to total bodily impairment; the order further provided that payment represents overpayment erroneously withheld.

On November 20, 1992, the Board issued an order granting the appeal, assigning Docket No. 92 5813, and directing that further proceedings be held on the issues raised therein.

2. Twila J. Calhoon was born April 1, 1958. She completed the eleventh grade.

3. Prior to September 1984, Ms. Calhoon experienced problems relating to her jaw and temporomandibular joints. Prior to September 1984, Ms. Calhoon's jaw problems did not result in any level of permanent partial impairment nor did they result in any physical restrictions which precluded her ability to perform any gainful employment on a reasonably continuous basis.

4. On September 28, 1984, Ms. Calhoon sustained an injury while in the course of her employment as a waitress with Alderbrook Inn. Ms. Calhoon simultaneously experienced a migraine headache and loud popping sensation which traveled up her upper back and neck when she turned and twisted in response to her name being called as she attempted to lift a large serving tray. Ms. Calhoon initially presented conservative treatment for her jaw and neck problems. By 1987 Ms. Calhoon had developed stabbing pain and tightness in her ears and neck, severe migraine headaches, jaw stiffness and tightness to the extent she had difficulty moving her jaw from left to right, and severe neck stiffness which interfered with her ability to turn her neck and/or put her head back. Between 1987 and 1991, Ms. Calhoon underwent numerous temporomandibular joint surgeries which provided temporary relief of her symptoms for a period of three to five months.

5. As of October 7, 1992, no further treatment was indicated, on a more probable than not medical basis, for the residuals of Ms. Calhoon's industrial injury.

6. As of October 7, 1992, Ms. Calhoon had a permanent partial disability of the temporomandibular joint which caused diminished function of the jaw and cervical spine and which was best described as 30% compared to total bodily impairment.

7. During the period of November 25, 1991 to October 7, 1992, the claimant was not capable of performing reasonably continuous gainful employment as a result of her industrial injury of September 28, 1984.

8. As of October 7, 1992, Ms. Calhoon was able to engage in reasonable continuous gainful employment given her age, education, work experience and physical capacities.

CONCLUSIONS OF LAW

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

2. As of October 7, 1992, the claimant's condition causally related to the industrial injury of September 28, 1984 was fixed and stable.

3. As of October 7, 1992, the claimant's level of permanent partial disability causally related to her industrial injury of September 28, 1984 was best described as 30% of total bodily impairment.

4. From November 25, 1991 through October 7, 1992, the claimant was temporarily totally disabled within the meaning of the Industrial Insurance Act.

5. As of October 7, 1992, the claimant was not a totally and permanently disabled worker within the meaning of the Industrial Insurance Act.

6. The order of the Department of Labor and Industries dated October 7, 1992, which set aside and held for naught the Department's order of July 6, 1992 and which closed the claim with time loss compensation as paid and with an award for permanent partial impairment consistent with Category 2 cervical impairment and 8% for the temporomandibular condition; compensation for unspecified disabilities of 18% as compared to total bodily impairment and which order further provided that payment represents overpayment erroneously withheld, is incorrect and is reversed and this matter is remanded to the Department of Labor and Industries with directions to pay the claimant temporary total disability benefits for the period of November 25, 1991 through October 7, 1992; pay an award for unspecified disabilities equal to 30% as compared to total bodily impairment; take such other and further action as the law and facts may indicate; and thereupon close the claim.

It is so ORDERED.

Dated this 20th day of January, 1994.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/______________________________________
S. FREDERICK FELLER Chairperson

/s/______________________________________
FRANK E. FENNERTY, JR. Member

/s/______________________________________
ROBERT L. McCALLISTER Member