Ellinghausen, Darla

AGGRAVATION (RCW 51.32.160)

Permanent total disability

Where a worker's claim is closed without an industrial insurance pension and later reopened, then reclosed, and the worker seeks increased permanent disability, the evidence of worsening does not need to be substantial; a slight worsening of a condition where the percentage rating of impairment does not increase can still result in the award of a pension provided that a preponderance of the evidence shows the worker can no longer maintain gainful employment. ***....In re Darla Ellinghausen,*** **BIIA Dec., 19 24229 (2021)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DARLA J. ELLINGHAUSEN	**)**	**DOCKET NOS. 19 24229 & 19 24320**
	)	
CLAIM NO. P-589145	**)**	**DECISION AND ORDER**

The claimant, Darla J. Ellinghausen, injured her left knee after slipping on ice while in the course of her employment. Despite relatively good results from her arthroscopic surgery, she was unable to return to her job of injury and participated in a six-week "secretarial" vocational retraining program. Her claim was closed in 2002 with a permanent impairment rating of 36 percent for her left knee. Despite her vocational retraining, Ms. Ellinghausen did not obtain a job doing clerical or office work. In 2004, Ms. Ellinghausen reopened her claim so she could get a total knee replacement surgery. Her claim was closed again in 2008 with an increased permanent impairment rating of 50 percent of her left leg. No additional vocational services were provided. Ms. Ellinghausen's claim was reopened again in 2009. The Department issued an order that denied time-loss compensation benefits and closed the claim without any increased impairment. The claimant argued that she has been unable to work as a result of her left knee injury and that she is permanently and totally disabled.

Our industrial appeals judge agreed with Ms. Ellinghausen and awarded time-loss compensation benefits and found her permanently and totally disabled. The Department argues that the industrial appeals judge erred because Ms. Ellinghausen did not make a prima facie case for benefits. We have granted review because, although we agree with our industrial appeals judge's findings, we wanted to provide further explanation as to why a preponderance of the evidence supports that Ms. Ellinghausen was unable to work and is entitled to a pension. The Department orders are **REVERSED AND REMANDED** to find Ms. Ellinghausen totally and temporarily disabled from August 1, 2012, through July 15, 2019, and to find Ms. Ellinghausen totally and permanently disabled as of July 16, 2019.

DISCUSSION

Darla Ellinghausen injured her left knee while working as a home care provider on December 6, 1996. Her claim has been closed and reopened on two occasions. We take judicial notice of the orders issued in 2007 and 2008 that closed Ms. Ellinghausen's claim with a 50 percent impairment rating for her left knee.

Ms. Ellinghausen's claim was opened again in 2009. She contends that she was unable to work since August 1, 2012, and, as of July 16, 2019, should be found permanently and totally disabled as a result of her industrial injury. A worker is permanently and totally disabled within the meaning of

the Industrial Insurance Act when as a result of an industrial injury she is unable to perform any substantial gainful employment existing in the labor market within the worker's qualifications.[1] Temporary total disability, which would warrant payment of time-loss compensation, differs from permanent total disability only in duration.[2]

With regard to the award of time-loss compensation benefits, the Department asserts that the testimony of S. Daniel Seltzer, M.D., about work restrictions for Ms. Ellinghausen's left knee, only applied as of July 1, 2019. Therefore, the Department maintains there is no medical testimony in the record to support that Ms. Ellinghausen was unable to work from August 1, 2012, through June 30, 2019. The Department concludes that without any medical restrictions to support her inability to work, Ms. Ellinghausen has failed to make a prima facie case for time-loss compensation benefits. We disagree. Testimony of a qualified vocational expert can support a finding of entitlement to time-loss compensation benefits.[3] The uncontested vocational testimony of Trevor Duncan, Psy.D., is not only sufficient to make a prima facie case for entitlement to time-loss compensation benefits, it is sufficient to find Ms. Ellinghausen was entitled to such benefits on a more probable than not basis.

Dr. Duncan testified that Ms. Ellinghausen did not have the skills to obtain work as an office clerk, receptionist, or similar position. His opinion was based on his review of the entire file, including prior medical and vocational records, including the Department's determination in 1996 that Ms. Ellinghausen was unemployable without retraining as a result of her left knee injury. Ms. Ellinghausen further testified that she was never able to obtain a clerical position even after undergoing the six-week retraining course. While it is res judicata that Ms. Ellinghausen was employable when her claim first closed in 2002 as a result of the skills obtained during her vocational retraining, and employable in 2008 when her claim closed a second time, Dr. Duncan's testimony that whatever clerical skills Ms. Ellinghausen obtained during her six week training course in 1998 are outdated and woefully inadequate to make her competitive in 2012 or in 2019 is persuasive. That is, even if we assume Ms. Ellinghausen was physically able to perform the job of office clerk or general clerk between 2012 and 2019, the vocational evidence is unrefuted that she did not have the vocational skills to obtain such a job during that same period of time. Accordingly, a preponderance

[1] *Allen v. Dep't of Labor & Indus.*, 30 Wn. App. 693, 697-98 (1981).
[2] *Bonko v. Dep't of Labor & Indus.*, 2 Wn. App. 22 (1970).
[3] *In re David Potts,* BIIA Dec., 88 3822 (1989).

of the evidence supports that Ms. Ellinghausen was unable to obtain or maintain full-time reasonably continuous employment between August 1, 2012, and July 1, 2019.

Similarly, the Department asserts that Ms. Ellinghausen failed to make a prima facie case that she is totally and permanently disabled because she has not shown objective evidence of worsening. The Department argues that because her claim was closed in 2008 with a 50 percent impairment rating for her left knee and both Dr. Seltzer and Micheal W. Gillespie, M.D. continue to rate Ms. Ellinghausen with a 50 percent impairment of her left knee, her condition has not worsened. We disagree.

Ms. Ellinghausen's application to reopen her claim in 2009 was deemed granted under RCW 51.32.060. Accordingly, Ms. Ellinghausen's left knee condition is considered to have objectively worsened on at least a temporary basis.[4] In order to be found permanently and totally disabled, Ms. Ellinghausen must now show that the worsening she sustained is permanent.[5] The evidence of worsening does not need to be substantial; a slight worsening of a condition where the percentage rating of impairment does not increase can still result in the award of a pension where the evidence supports that the worker can no longer maintain gainful employment.[6]

Although both of the medical experts had reviewed extensive records regarding Ms. Ellinghausen's left knee condition, neither testified about specific range of motion findings on exam when her claim closed in 2008. However, Dr. Gillespie testified about multiple x-rays he reviewed of Ms. Ellinghausen's left knee between 2009 and 2018. X-rays from August 2009 showed a satisfactory total knee arthroplasty with no documented complications. X-rays from 2015 also appeared normal, meaning there was nothing to suggest a loosening of hardware in the left knee. But an x-ray taken on April 11, 2018, suggested loosening of the femoral component in the left knee. The 2018 x-ray would be consistent with Dr. Seltzer's testimony that Ms. Ellinghausen's hardware from her total knee replacement surgery in 2005 has deteriorated to some degree over the prior 14 years and that deterioration would account for her loss of function and increased pain.

In addition to the x-ray evidence, the record reveals additional worsening between Dr. Gillespie's examination in February 2019 and Dr. Seltzer's examination of Ms. Ellinghausen in July 2019. In February 2019, Dr. Gillespie documented that Ms. Ellinghausen had definite valgus

[4] *In re Patricia A. Gaulien-Hill*, Dckt. No. 14 16897 (August 4, 2015); *In re Maria Chavez*, BIIA Dec., 87 0640 (1988).
[5] *In re Duane Marquardt*, Dckt. No. 00 16936 (July 12, 2001).
[6] *In re Otis R. Lovett*, Dckt. No. 69642 (April 24, 1986).

alignment in her right knee but good alignment in her left. By July 2019, Dr. Seltzer documented varus deformities on both the right and left knees. Dr. Gillespie noted Ms. Ellinghausen had full extension with a clicking sound of unknown origin and flexion of 110 degrees in her left knee. Dr. Seltzer found an overall decreased range of motion, including only 90 degrees of flexion in the left knee. Finally, Dr. Gillespie testified that Ms. Ellinghausen's patella on the left knee was well-centered and aligned. Dr. Selzter testified that her patella was slightly offset and to the lateral side in her left knee.

In addition to the x-rays and documented deterioration in left knee function between January and July 2019, Dr. Seltzer also provides new permanent work restrictions consistent with "sub-sedentary" levels of employment. These new restrictions prevent Ms. Ellinghausen from working in even a sedentary office clerk position without modifications. These restrictions were not in place when Ms. Ellinghausen's claim was closed in 2008. The increase in permanent physical restrictions also supports that her disability, as a result of the industrial injury, has worsened since 2008 and that Ms. Ellinghausen is permanently restricted from returning to work on a reasonably continuous basis.

When considering the documented worsening of Ms. Ellinghausen's left knee between Dr. Gillespie's examination in February 2019 and Dr. Selzter's examination in July 2019, deterioration of hardware in her left knee between 2008 and 2019, and the permanent increase in Ms. Ellinghausen's physical restrictions as a result of her injury, we find a preponderance of the evidence supports that Ms. Ellinghausen's disability as a result of the industrial injury has permanently increased since her claim was closed in 2008 even though her percentage of impairment rating has not. Further, a preponderance of the evidence supports that Ms. Ellinghausen was permanently and totally disabled as of July 16, 2019.

DECISION

1. In Docket No. 19 24229, the claimant, Darla J. Ellinghausen, filed a protest with the Department of Labor and Industries on September 3, 2019. The Department forwarded it to the Board of Industrial Insurance Appeals as an appeal. The claimant appeals a Department order dated July 16, 2019. In this order, the Department affirmed a prior order closing the claim as of May 13, 2019. This order is incorrect and is reversed and remanded.
2. In Docket No. 19 24320, the claimant, Darla J. Ellinghausen, filed a protest with the Department of Labor and Industries on September 3, 2019. The Department forwarded it to the Board of

Industrial Insurance Appeals as an appeal. The claimant appeals a Department order dated July 15, 2019. In this order, the Department affirmed a prior order that denied time-loss compensation benefits from August 1, 2012, through May 9, 2019. This order is incorrect and is reversed and remanded.

FINDINGS OF FACT

1. On February 24, 2020, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Darla Ellinghausen sustained an industrial injury to her left knee on December 6, 1996, when she slipped and fell on ice while working as a home caregiver.

3. Ms. Ellinghausen was 60 years old at the time of her testimony. She has a high school education and limited work experience in a juice processing plant, as a home caregiver, and as a dialysis technician.

4. Ms. Ellinghausen underwent a six-week vocational retraining program in 1998 for "secretarial" work. After successfully completing the retraining program, Ms. Ellinghausen did not obtain work in an office environment. Her claim was closed in 2002 with a 38 percent impairment of the amputation value of the left leg above knee joint with short thigh stump.

5. Ms. Ellinghausen's claim was reopened so she could undergo a total knee replacement surgery. On May 21, 2008, Ms. Ellinghausen's claim was closed a second time with a permanent impairment rating of 50 percent of the amputation value of the left leg above knee joint with short thigh stump. She did not receive additional vocational retraining prior to her claim being closed in 2008.

6. Between August 1, 2012, and July 15, 2019, any office skills that Ms. Ellinghausen obtained during her six-week vocational retraining course in 1998 were outdated and no longer sufficient to render her employable.

7. Ms. Ellinghausen was unable to perform or obtain gainful employment on a reasonably continuous basis from August 1, 2012, through July 15, 2019, due to the residuals of the industrial injury and taking into account the claimant's age, education, work history, and preexisting conditions.

8. Between May 21, 2008, and July 16, 2019, Ms. Ellinghausen's left knee condition proximately caused by the industrial injury permanently worsened. The worsening is supported by objective findings that include x-ray evidence suggestive of a loosening of hardware in the left knee; loss of range of motion, including loss of flexion in the left knee; the development a varus deformity in the left knee; and movement of Ms. Ellinghausen's patella to the lateral side of her left knee.

9. As of July 1, 2019, Ms. Ellinghausen was permanently restricted to sitting for two hours at a time, up to eight hours a day; standing for 30 minutes at a time, up to one hour a day; walking 30 minutes at a time, up to one hour per day; lifting and carrying up to five pounds on an occasional basis; and no bending, squatting, kneeling, crawling, or climbing. These restrictions place Ms. Ellinghausen in a sub-sedentary category of work.

10. As of July 16, 2019, Ms. Ellinghausen's conditions proximately caused by the industrial injury were fixed and stable.

11. Ms. Ellinghausen was unable to perform or obtain gainful employment on a reasonably continuous basis as of July 16, 2019, due to the residuals of the industrial injury and taking into account the claimant's age, education, work history, and preexisting conditions.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.

2. Darla Ellinghausen's left knee conditions proximately caused by the industrial injury were fixed and stable as of July 16, 2019, and she is not entitled to further treatment. RCW 51.36.010.

3. Ms. Ellinghausen was a temporarily totally disabled worker within the meaning of RCW 51.32.090 from August 1, 2012, through July 15, 2019.

4. Ms. Ellinghausen was a permanently totally disabled worker within the meaning of RCW 51.08.160, as of July 16, 2019.

5. The Department orders dated July 15, 2019, and July 16, 2019, are incorrect and are reversed. This matter is remanded to the Department to pay time-loss compensation benefits from August 1, 2012, through July 15, 2019, and to find Darla Ellinghausen permanently totally disabled as of July 16, 2019.

Dated: March 18, 2021.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

ISABEL A. M. COLE, Member

Addendum to Decision and Order
In re Darla J. Ellinghausen
Docket Nos. 19 24229 & 19 24320
Claim No. P-589145

Appearances

Claimant, Darla J. Ellinghausen, by Prediletto, Halpin, Scharnikow & Nelson, P.S., per Brett N. Goodman

Employer, SL Start & Associates Human Service, by Sedgwick CMS (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per James A. Yockey

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order issued on November 19, 2020, in which the industrial appeals judge reversed and remanded the orders of the Department dated July 16, 2019, and July 15, 2019. The claimant filed a response to the Department's Petition for Review.

Evidentiary Rulings

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