Madrigal, Ramiro

DEPARTMENT

Administrative convenience

The Department must fairly determine the extent of benefits owed injured workers in Washington State as well as outside the state and its obligation is not met when administrative convenience prevails over claimant's life situation. The Department cannot refuse to schedule an examination in Mexico for administrative purposes since a Mexican doctor would not be easily available to testify at a hearing in a circumstance where the worker resided in Mexico and was unable to obtain visa for legal entry. **….*In re Ramiro Madrigal*, BIIA Dec., 91 2559 (1993)** [*Editor's Note*: RCW 51.32.110 (6) was changed by Laws 1997 Ch 325 §2.]

SUSPENSION OF BENEFITS (RCW 51.32.110)

Refusal to attend medical examination

The Department inappropriately suspended benefits due to a worker's failure to attend an examination scheduled in Washington when the worker resided in Mexico and was unable to obtain visa for legal entry. **….*In re Ramiro Madrigal*, BIIA Dec., 91 2559 (1993)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RAMIRO MADRIGAL	**)**	**DOCKET NO. 91 2559**
	)	
CLAIM NO. J-138698	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ramiro Madrigal, by
Charles Barr, Attorney at Law

Employer, James G. Lyall, by
None

Department of Labor and Industries, by
The Attorney General, per
Sharon M. Brown and Kevin M. Hartze, Assistants

This is an appeal filed by the claimant on May 20, 1991 from an order of the Department of Labor and Industries dated May 1, 1991 which adhered to the provisions of a Department order issued on April 27, 1990 which suspended the claimant's benefits for failure to appear at a medical examination as scheduled by the Department on April 27, 1990 in Seattle, Washington. **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

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 claimant to a Proposed Decision and Order issued on June 26, 1992 in which the order of the Department dated May 1, 1991 was affirmed.

Evidentiary rulings:

The following evidentiary rulings in the transcript of April 24, 1992 are reversed:

1. Hearsay objections raised during the testimony of Ramiro Madrigal at page 33, line 2; and page 34, lines 3 and 18 were all sustained by the industrial appeals judge. The nature of the testimony was that Mr. Madrigal had applied for, but not received, a visa to enter the United States. While inquiries into the basis for the denial of a visa were properly excluded as hearsay, the claimant's personal knowledge that he did not receive a visa is not. As Mr. Madrigal's assertion that he cannot legally enter the United States is the basis for his allegation of good cause for failure to appear at a scheduled medical examination, the erroneous evidentiary rulings excluding his testimony were prejudicial. The objections are overruled.

2. At page 54, line 17, during the testimony of Dr. Julio Pena Gallardo, the Department raised a foundation objection to the doctor's findings of

limitation of range of motion in the claimant's back on the basis that the doctor did not specify the dates of examinations. The industrial appeals judge sustained the objection. The lack of specificity goes to the weight accorded to the testimony. The Department could have pursued further detail on cross-examination. The objection is overruled.

3. At page 58, line 21 the Department objected to Dr. Gallardo reading into the record from a radiological report which he relied on in arriving at his diagnosis. Under ER 703 it is proper to inquire into all data relied upon by an expert in arriving at the opinion offered into evidence. The industrial appeals judge erroneously sustained the objection and it is hereby overruled.

4. At page 60, line 21, the industrial appeals judge sustained the Department's objection to the relevance of a question relating to the availability of medical doctors to examine the claimant in Mexico. The question was relevant because the Department alleged that the claimant's physical condition could not be evaluated in Mexico due to the unavailability of physicians. This objection is also overruled.

Exhibits submitted at hearing:

The exhibits offered by the Department in the transcript of April 24, 1992 at page 89, lines 89, 90 and 91 and at page 108, line 110 and numbered as "Department's" Exhibit Nos. 1, 2, 3 and 4 are renumbered as Exhibit Nos. 4, 5, 6 and 7 respectively, but remain rejected.

Exhibits submitted after hearing:

In the transcript of proceedings of April 24, 1992 at page 67, line 3, the parties stipulated to the admission of a letter to be submitted by Dr. Gallardo confirming that he was the witness who testified by telephone on April 24, 1992, his identity and of a copy of Dr. Gallardo's medical license. On May 26, 1992, the Board received several documents from Charles Barr, the claimant's attorney, including an original notarized statement from Dr. Gallardo in Spanish and a copy of his license to practice medicine, also in Spanish. In addition, the claimant's attorney took it upon himself to provide English language translations of the documents. The Department objects to the use of translations provided by the claimant's representative.

At the time of the hearing, the doctor testified in Spanish with the assistance of a translator. The parties should have anticipated that any written materials he submitted would also be in Spanish and require translation. It was reasonable that, as the party submitting the documentation, the claimant be responsible for providing English translations of the materials. The Department first raised an objection to the use of translations provided by the claimant in a Response to Petition for Review received at the Board on November 9, 1992, well after the deadline established for response in WAC 263-12-145(4). The objection

is general in nature and does not allege any inaccuracy in the translations. The Department's objection is neither timely nor well taken and is overruled.

Pursuant to the stipulation of the parties on April 24, 1992, the April 28, 1992 affidavit of Dr. Julio Pena Gallardo is numbered as Exhibit No. 8 and is admitted for the limited purpose of confirming his participation in the April 24, 1992 telephone hearing. The May 21, 1992 English language translation of Dr. Gallardo's affidavit is numbered as Exhibit No. 9 and admitted with the same restriction. The Spanish language copy of Dr. Gallardo's medical license is numbered as Exhibit No. 10 and is admitted. The May 21, 1992 English language translation of Dr. Gallardo's medical license is numbered as Exhibit No. 11 and is admitted.

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

DECISION

Claimant Ramiro Madrigal petitions for review of a Proposed Decision and Order upholding a Department order which suspended his benefits for failure to submit to a medical examination scheduled in Seattle, Washington. The issue on appeal is whether the claimant had good cause for failure to appear.[1] We find that he did.

Ramiro Madrigal was a 64 year old illegal alien agricultural worker when he fell from a ladder and injured his back in 1982. He received benefits while residing in the Tri-Cities area until 1988. In the spring of that year, Mr. Madrigal returned to Mexico. After 1988, the Department made repeated attempts to schedule a closing medical examination for Mr. Madrigal in Washington state. Mr. Madrigal repeatedly failed to appear at the examinations, citing his residence in Mexico, his lack of a visa to permit entry into the United States, lack of funds, and physical infirmity.

When Mr. Madrigal failed to appear for an examination on April 27, 1990, the Department issued an order suspending his benefits. When Mr. Madrigal protested, the suspension order was held in abeyance pending documentation of the claimed impediments to travel. The Department did not receive what it considered adequate documentation and ultimately scheduled another medical examination in Seattle for April 27, 1991. Upon Mr. Madrigal's failure to appear for that examination, the Department issued an order affirming the earlier suspension of benefits.

[1]The claimant's Petition for Review also raises constitutional challenges to the suspension of benefits, but constitutional questions are beyond the jurisdiction of this Board.

On appeal to the Board from an order suspending benefits, the claimant has the burden of showing, by a preponderance of the evidence, that the Department order is incorrect. RCW 51.32.110 provides, in pertinent part:

> Any worker entitled to receive any benefits or claiming any such under this title shall, if requested by the department or self-insurer, submit himself or herself for medical examination, at a time and from time to time, at a place reasonably convenient for the worker and as may be provided by the rules of the department. If the worker refuses to submit to medical examination, or obstructs the same, . . . the department, with notice to the worker may suspend any further action on any claim of such worker so long as such refusal, obstruction [or] non-cooperation . . . continues and reduce, suspend or deny any compensation for such period: Provided, however, that the department . . . shall not suspend any further action on any claim of a worker or reduce, suspend or deny any compensation if a worker has good cause for refusing to submit to or to obstruct any examination . . . requested by the department or required under this section. (Emphasis added.)

As this Board observed in In re: Bob C. Edwards, Docket No. 90 6072 (June 4, 1992), the existence of good cause in a given case depends on a variety of factors unique to that case. Among the considerations are the claimant's physical condition, capacities, sophistication, circumstances of employment, family responsibilities, medical treatment, proven ability or inability to travel, and, as in this instance, any legal impediments to travel. All of these factors must be balanced against the Department's responsibility to insure an even-handed resolution of disputed issues in light of conflicting medical information, the location of willing and qualified physicians, and the length of time before a physician is available to perform an examination and the reasonable expense thereof.

Our industrial appeals judge considered and rejected the four factors raised by the claimant in support of his defense of good cause for failure to appear: physical infirmity, lack of funds, the fact of his residence in Mexico, and his lack of a visa permitting entry into the United States.

We agree with the hearing judge's conclusion that Mr. Madrigal did not establish by a preponderance of the evidence that his physical condition prevented him from traveling to Seattle. The record establishes that Mr. Madrigal is in his seventies. He has an accepted back injury, but the record does not tell us the nature of the injury. Dr. Gallardo testified without reference to the claimant's medical records. His sole reference to Mr. Madrigal's condition as of April 1990 was that the claimant had "a pain in his waist which was very strong and it is difficult for him to travel any distances." 4/24/92 Tr. at 52. Dr. Gallardo had no information about Mr. Madrigal's condition in 1991. Based on

an x-ray taken in April 1992, Dr. Gallardo diagnosed degenerative disc disease, a compression fracture of L-2 and loss of intervertebral space at L1-2. He did not relate this diagnosis to the industrial injury. He did not testify that the diagnosed conditions were present at the time of the order here under appeal.

We further conclude that there was no financial good cause for the claimant not to appear in Seattle. The Department of Labor and Industries made air travel arrangements and advanced funds sufficient to cover legitimate expenses associated with a trip to Seattle for the examination.

Mr. Madrigal raises the issue of his residence in Mexico to challenge whether the location of the scheduled examination was "convenient" as mandated by RCW 51.32.110. The department approached the issue of convenience solely from the standpoint of the Department's ease in obtaining physicians to perform the examination. As established in the testimony of claims consultant Laura Farley, the Department gave no consideration to any legal impediment to Mr. Madrigal's access to those physicians. Ms. Farley testified that the claimant's attorney advised her "previously several years ago" that Mr. Madrigal did not have a visa. 4/24/92 Tr. at 95. He provided her with the names and addresses of various medical specialists in the Mexican state in which Mr. Madrigal resides. She rejected all of the physicians out of hand because no psychiatrist was included in the list of referrals. She made no independent effort to locate such a specialist on behalf of the Department or to obtain examinations from the orthopedic and neurological specialists whose names were provided.

In March 1988, the claimant's attorney provided Ms. Farley with a copy of a U.S. State Department Bulletin addressing the lack of availability of visas to Mexican residents. Ms. Farley stated on the record that she considered scheduling the medical examination in a border state, such as Texas or California, but settled on Washington because of the claimant's assertions that he did not have a visa to enter the country. Under those circumstances, she felt Seattle was "easier . . . for testifying purposes." 4/24/92 Tr. at 95. In other words, based on the understanding that Mr. Madrigal could not enter the United States in any event, the Department proceeded on the basis of anticipated litigation rather than attempting to obtain current medical information in any other fashion!

Like the Department, the hearing judge questioned the credibility of Mr. Madrigal's assertion that he lacked the necessary visa to gain entry to the United States. The industrial appeals judge found him unpersuasive because he admitted to an established pattern of past entry into the United States. What Mr. Madrigal admitted to was a history of illegal entries by various means such as

swimming rivers, hiding in trucks, and bribing people. This is not an atypical history, but it does not establish that the claimant has unlimited or unrestricted access to the United States.

To begin, we take judicial notice of the fact that U.S. immigration laws require that a foreign national who wishes to enter the United States must apply for and receive a visa from an American consulate, 8 USC § 1200, et seq.. Mere application for a visa does not guarantee its issuance.

There is nothing in the record to indicate that Mr. Madrigal is not being forthright about his lack of a visa. Mr. Madrigal testified that he left the United States for the last time when he returned to Mexico to bury his wife in 1988. He was at that time 70 years old and suffering from the effects of his industrial injury. He testified that he applied for a visa at the U.S. consulate in Guadalajara on March 11, 1991. His application was denied and he did not receive a visa.

The Department made no effort to rebut Mr. Madrigal's testimony that he lacked the necessary documentation to enter the United States legally. The Department's case on this point consisted entirely of its assertion that it had received no written proof of Mr. Madrigal's immigration status. There is no indication in the record of how the Department expected Mr. Madrigal, an unsophisticated 70 year old agricultural worker, living a thousand miles distant from his legal counsel, to wrest proof of lack of a visa from the U.S. Consulate in Guadalajara. The Department's presumption that the claimant has free access to the United States is contrary to all information available in this record.

Our industrial appeals judge applied an overly harsh standard in concluding that Mr. Madrigal had presented no "compelling evidence" that he was legally barred from entering the United States. The appropriate standard was whether Mr. Madrigal had proven, by a preponderance of the evidence presented, that such a bar existed. We find that he did.

Viewed in its totality, the preponderance of the evidence in this case establishes that Mr. Madrigal lacked the necessary legal documentation to the enter the United States at the time of the April 27, 1990 medical examination. While he did not apply for a visa at that time, there is nothing to indicate that he would have been any more successful then than he was in 1991. Inability to legally enter the country where the examination is scheduled is good cause for failure to appear at the examination. The Department improperly suspended Mr. Madrigal's benefits for failure to appear at the examination scheduled on April 27, 1990.

We recognize that the determination of further benefits, if any, to which Mr. Madrigal may be entitled under our Industrial Insurance Act, may well require further medical documentation of his industrially related condition. We are frankly at a loss as to how to address the Department's concerns

that competent medical examiners in Mexico may not adapt themselves to the legal and procedural requirements of our Industrial Insurance Act in evaluating and reporting on the claimant's physical condition. However, the Act does impose an obligation on the Department to fairly and competently determine the extent of benefits due to workers injured in the course of their employment while in this state. That obligation is not lifted, so far as we are aware, when the worker relocates to another state or even to another country. That obligation is not met when the Department ignores the realities of the claimant's situation in life in favor of its own administrative "convenience."

We will remand this matter to the Department with directions to rescind and set aside the suspension orders of April 27, 1990 and May 1, 1991; to reschedule any required medical examination at a location convenient to the claimant, taking into account that the claimant may not be legally able to return to the United States for the examination; to reinstate such benefits to which the claimant may be found to be entitled; and to take such further appropriate action as indicated.

Proposed Findings of Fact Nos. 1 and 2 and Proposed Conclusion of Law No. 1 are correct and are hereby adopted as this Board's final findings and conclusions. In addition, we enter the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

3. At all times relevant to this appeal Ramiro Madrigal has been a resident of the nation of Mexico who requires a visa to legally enter the United States of America.

4. At no time relevant to this appeal has Ramiro Madrigal possessed a visa permitting him entry into the United States of America.

5. In March 1988, the claimant informed the Department of Labor and Industries that he lacked the necessary visa to obtain entry into the United States.

6. At the time the Department scheduled the examination of April 27, 1990, the Department was aware of facts which would prevent the claimant from attending an examination at the scheduled location of Seattle, Washington.

7. Ramiro Madrigal was unable to appear for the medical examination scheduled on April 27, 1990 in Seattle, Washington because he resided in Mexico and did not possess a visa permitting him to enter the United States of America.

CONCLUSIONS OF LAW

2. Ramiro Madrigal's failure to appear at a regularly scheduled medical examination on April 27, 1990 was based on good cause within the meaning of RCW 51.32.110.

3.3 The Department order of May 1, 1991 which adhered to the provisions of a Department order issued on April 27, 1990 which suspended the claimant's benefits for failure to appear at a medical examination as scheduled by the Department on April 27, 1990 in Seattle, Washington, is incorrect and is reversed and the claim remanded to the Department with direction to rescind and set aside the orders of April 27, 1990 and May 1, 1991; to reschedule any required medical examination at a location convenient to the claimant, taking into account that the claimant may not be legally able to return to the United States for the examination; to reinstate such benefits to which the claimant may be found to be entitled; and to take such further action in the claim as may be indicated by the facts and authorized by law.

It is so ORDERED.

Dated this 29th day of January, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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

/s/_____
PHILLIP T. BORK Member