Boyle, Ann

SCOPE OF REVIEW

Time-loss compensation

The Board is without jurisdiction to consider permanent total disability in appeal from order paying time-loss compensation benefits for a particular period. (*Overruling In re Arthur C. Ryals*, Dckt. No. 87 2998 (September 26, 1989); *Citing In re Betty Connor*, BIIA Dec., 91 0634 (1992)). **….*In re Ann Boyle*, BIIA Dec., 93 3740 (1994)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 94-2-11074-8. But see *In re Douglas Palmer*, BIIA Dec., 14 13660 (2015).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ANN L. BOYLE	**)**	**DOCKET NO. 93 3740**
	)	
CLAIM NO. H-691086	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ann L. Boyle, by
Cohen, Keith-Miller & Dingler, per
Norman W. Cohen, Attorney

Employer, F V R Corp., by
None

Department of Labor and Industries, by
Office of the Attorney general, per
Mary V. Wilson, Assistant

This is an appeal filed on behalf of the claimant with the Board of Industrial Insurance Appeals on August 9, 1993, from an order of the Department of Labor and Industries dated July 30, 1993, which paid time loss compensation from July 14, 1993 through July 28, 1993. The appeal is **DISMISSED**.

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 claimant, Ann Boyle, to a Proposed Decision and Order dated January 7, 1994 which dismissed her appeal.

The only substantive issue Ms. Boyle raises in this appeal is her eligibility for permanent total disability benefits. Ms. Boyle appeals from a Department order setting forth her eligibility for time loss benefits between July 14 and 28, 1993. Our industrial appeals judge dismissed her appeal, relying on our recent decision In re Betty Connor, BIIA Dec., 91,0634 (1992). Although we agree with our judge's decision and his analysis, we granted review to clarify our holding in this recent significant decision.

Connor involved an appeal by a self-insured employer from an order requiring it to pay time loss benefits. This order was substantially similar to the one at issue here: both orders required payment of time loss compensation for a specified period, but did not close the claim. In Connor, the employer sought to close the claim without payment of any additional benefits. We held the Board lacked jurisdiction to require the Department to close the claim and to determine the extent of claimant's permanent impairments because the Department had not yet addressed these issues. Connor, supra, at 6.

In this appeal, Ms. Boyle also seeks to close her claim. She argues she is not merely temporarily totally disabled, but is instead permanently unemployable. Our industrial appeals judge dismissed Ms. Boyle's appeal on the basis that this Board lacks jurisdiction to determine her eligibility for permanent total disability benefits. We agree with this decision. Our holding in Connor applies to both injured workers and employers. Accordingly, neither party can litigate the fixity of a claimant's medical condition, or the extent of his or her permanent impairment, until the Department issues an order addressing these issues.

Our industrial appeals judge issued his ruling in response to a Department motion which was variously described in the record as one for summary judgment, for dismissal, and for judgment on the pleadings. (The Department initially filed for summary judgment, and, at claimant's suggestion, orally amended its motion during an informal conference to one for judgment on the pleadings). Since we base our decision solely on the parties' pleadings without any evidentiary record, the caption on the Department's motion is of little import. Because this Board lacks jurisdiction to determine the sole issue raised in this appeal, the July 30, 1993 Department order must be sustained and claimant's appeal is properly dismissed under the provisions of CR 56, CR 12(b)(6), or CR 12(c). The appropriate analysis, and ensuing result, is essentially the same under all three rules. Blenheim v. Dawson & Hall, 35 Wn.App. 435 at 439, FN 2 (1983). In each case, the allegations in Ms. Boyle's pleadings must be accepted as true, since she is the non-moving party. Dennis v. Heggen, 35 Wn.App. 432 (1983). Her appeal is properly dismissed if it appears she cannot prove any set of facts that would entitle her to the relief she seeks. Orwick v. City of Seattle, 103 Wn.2d 249 (1984).

The dispositive issue in this appeal, then, is the extent of our subject matter jurisdiction. If this Board lacks jurisdiction to determine whether Ms. Boyle is permanently totally disabled, her appeal must be dismissed. As we have already indicated, we believe we lack this authority. Our jurisdiction is limited to an appellate review of matters first determined by the Department. In re Betty Connor, supra, at 6. Until the Department issues a decision or order regarding an issue, it cannot be reviewed by this Board. Lenk v. Dep't of Labor & Indus., 3 Wn. App. 977 (1970). Accordingly, since the Department has not yet issued an order determining whether Ms. Boyle's claim should be closed and which assesses her degree of permanent impairment, if any, we cannot review her eligibility for pension benefits.

The principal legal authority cited by the claimant to support her argument that we have the authority to hear her appeal is a decision that pre-dates Connor. In re Arthur C. Ryals, Dckt. 87 2998

and 87 3983 (September 26, 1989). This decision involved a determination of whether a claimant was permanently and totally disabled prior to the effective date of a 1986 statute that would have reduced his benefits. As such, its principal focus is the applicability of a provision that required workers compensation benefits to be reduced by social security benefits. The Board declined to determine Mr. Ryals' eligibility for a pension. However, in dicta, the Board indicated it believed it had jurisdiction to determine whether an injured worker had become permanently and totally disabled in an appeal from an order paying time loss benefits. Ryals, supra, at 7. Although we declined to follow this dicta in Connor, we did not specifically disavow this language. We do so here.

Not only is this dicta contrary to the holdings of governing appellate decisions, but it is also is rejected as poor policy. We again wish to underscore our agreement with our industrial appeals judge's thorough analysis. Ms. Connor maintains the Department implicitly decided her condition was not fixed and she was ineligible for a pension when it issued the order under appeal. In short, by finding her eligible for time loss compensation, she believes the Department necessarily considered and rejected her eligibility for permanent total disability benefits. This argument is not consistent with the Department's practice and needlessly encourages premature litigation. If we were to adopt such a broad view of our jurisdiction, any party could place all alternate benefits available to him or her under the Industrial Insurance Act at issue in any appeal before this Board. We will not adopt this view. Further, by allowing the Department to rule on an issue prior to our consideration of an appeal, a claimant may obtain the resolution he or she seeks without additional litigation.

Turning to the specific context for this appeal, if we held this Board has the legal authority to determine a claimant's eligibility for pension benefits in an appeal from a time loss order, we would create a risk of inconsistent decisions in multiple appeals. For example, Ms. Boyle has two other appeals from time loss orders pending before us (Dockets 93 4017 and 93 4346). Her three appeals, all of which involve her assertion that she is permanently totally disabled, were at one point assigned to different judges. Ms. Boyle's counsel objected on the record to having these three appeals heard by the same industrial appeals judge. 11/9/93 Tr. at 13-14. It appears he wanted to litigate the same issue before two different judges. This is precisely the end result that we wish to avoid. However, since the Department regularly issues time loss orders when administering a claim, it would clearly be possible for multiple appeals involving a claimant's eligibility for pension benefits to be heard before different judges in this agency. By limiting our jurisdiction to hear such appeals to Department orders that address the extent of a claimant's permanent impairments, this risk is essentially eliminated.

We do not believe Ms. Boyle is harmed by our ruling. She is currently receiving time loss benefits, and would not receive any more additional compensation if she were eligible for a pension. Additionally, she can currently obtain medical benefits through the Department, which she could not normally do after her claim is closed. While we acknowledge Ms. Boyle may have an increased sense of security by obtaining an order determining she is permanently and totally disabled, she may still obtain the order she desires by alternate means. Ms. Boyle can ask the Department to specifically address her request for claim closure by issuing an order closing the claim or, conversely, refusing her request. Upon the issuance of a further Department order, we could then consider her current claim for relief. If the Department refused to determine the extent of her permanent impairments, Ms. Boyle could further appeal that determination.

For the reasons indicated above, we are reaffirming the Proposed Decision and Order dismissing Ms. Boyle's appeal. We direct our Industrial Appeals Judge to enter orders in her companion appeals that are consistent with this decision. We adopt, with minor corrections, the Findings of Fact and Conclusions of Law in the Proposed Decision and Order. We have added the date of claimant's injury to Finding of Fact 1. Conclusion 1 is corrected to specify we lack subject matter jurisdiction over the substance of this appeal. Conclusion 2 is narrowed. Though we lack jurisdiction to determine a claimant's eligibility for pension benefits in an appeal, such as this one, where the Department has not considered the fixity of his or her condition, we can reach this issue in other appeals from orders paying time loss benefits (for example, from closing orders which also require payment of such benefits).

For the above-mentioned reasons, the undersigned enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On May 6, 1980, claimant, Ann L. Boyle, filed an application for benefits alleging that she suffers from a carpal tunnel condition as a result of an industrial injury on July 1, 1979, which occurred during the course of her employment by F V R Corp. The claim was allowed and assigned Claim H-691086.

   On July 30, 1993, the Department of Labor and Industries issued an order which paid time loss compensation from July 14, 1993 through July 28, 1993.

   Claimant filed her Notice of Appeal with the Board of Industrial Insurance Appeals on August 9, 1993; she also served a copy of her Notice of

Appeal on the director of the Department on that date. The Board issued its order granting the appeal on August 23, 1993.

2. As the sole relief sought under this appeal, claimant seeks a pension -- a finding that she was permanently totally disabled during the period July 14, 1993, through July 28, 1993 or at some earlier date; she does not otherwise dispute the correctness of the order under appeal.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties but not the subject matter of this appeal.

2. Under RCW 51.52.050, in an appeal from an order which only determines the amount of time loss compensation due a claimant during a specific time period, the Board does not have jurisdiction to determine whether the claimant was eligible for permanent total disability benefits before or during the period for which time loss compensation was paid.

3. Claimant's appeal, filed with the Board of Industrial Insurance Appeals, from an order of the Department of Labor and Industries, dated July 30, 1993, which paid time loss compensation from July 14, 1993 through July28, 1993, must be, and hereby is, dismissed.

It is so ORDERED.

Dated this 15th day of April, 1994.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
S. FREDERICK FELLER Chairperson

/s/
ROBERT L. McCALLISTER Member