

Biers, John, Dec'd

RES JUDICATA

Surviving beneficiary's claim affected by prior adjudication on the merits in worker's claim

A widow claiming entitlement to a survivor's pension based on the contention that the worker was permanently totally disabled at the time of his death is bound by a prior final adjudication under the worker's claim that the condition causing his disability was not caused by the industrial injury. ...*In re John Biers, Dec'd, BIIA Dec., 17,754 (1966)*

Scroll down for order.

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

1 **IN RE: JOHN BIERS, DEC'D**) **DOCKET NO. 17,754**
2)
3 **CLAIM NO. C-87671**) **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Petitioner, Anna Biers, by
8 Irwin S. Elyn and
9 Gerald Shucklin (Associate Counsel)

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11 Employer, Northwestern Improvement Company,
12 None

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 Kenneth E. Phillipps, William J. Van Natter, and Wesley G. Hohlbein, Assistants
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18 Appeal filed by the petitioner on May 1, 1962, from an order of the Supervisor of Industrial
19 Insurance dated March 13, 1962, rejecting this claim for a widow's pension. **SUSTAINED.**
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21 **DECISION**

22 The Board has reviewed the record in the light of a Proposed Decision and Order issued in
23 this matter on February 26, 1965, and a Statement of Exceptions duly filed thereto by the
24 Department of Labor and Industries on March 16, 1965. As a result thereof, we conclude the
25 exceptions are well taken and that this claim must be rejected.
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28 The medical evidence as a whole leads us to conclude that the decedent was permanently
29 unfit for gainful employment by reason of a worsened back condition at the time of his death. The
30 proximate cause of such worsening is disputed as a matter of medical inquiry, although, as we shall
31 subsequently point out, it is undisputed as a matter of law. Dr. James P. Mooney, a general
32 practitioner and the decedent's attending doctor, attributed the decedent's worsened back condition
33 and his total disability to his industrial injury, whereas two orthopedic specialists presented by the
34 Department placed the blame on the natural progression of aging processes.
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39 The Hearing Examiner resolved this issue by giving greater weight to the testimony of the
40 decedent's attending doctor by virtue of what we deem to be a purely mechanical application of
41 Spalding v. Department of Labor and Industries, 29 Wn. 2d 115. We find ourselves unable to
42 subscribe to this disposition.
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45 The Spalding case does not purport to enunciate some sort of immutable rule or mandate
46 that the opinion of an attending or treating doctor is per se controlling upon disputed medical points.
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1 The Court expressly noted it was not laying down any hard and fast rule, and clearly indicated that
2 the qualifications of the attending doctor had to be considered. Moreover, the medical dispute in
3 Spalding revolved around the extent of disability, whereas in the instant matter, it centers upon the
4 cause thereof. This alone logically constitutes a distinction with a difference, although, here again,
5 it is but one of several factors to be considered in weighing conflicting opinions in arriving at a final
6 judgment on the point in issue, and is not in itself, controlling.
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10 The testimony of the petitioner's doctor, Dr. Mooney, is of the weakest sort. He only saw the
11 decedent a few times. Insofar as his testimony discloses, he apparently never conducted a
12 thorough physical examination of the decedent. For the most part, his testimony consisted of
13 reading statements and complaints from various applications to reopen the decedent's claim, and
14 giving answers to highly leading questions. His testimony is devoid of any specific physical
15 findings. The doctor was a general practitioner with no specific knowledge or training in the field of
16 orthopedics. In this respect, his testimony demonstrated no more than a very general and basic
17 knowledge of the pathological conditions involved which fall squarely within the orthopedic field of
18 medical specialty.
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21 In our opinion, the clear weight of the medical evidence, as rendered by two orthopedic
22 specialists presented by the Department, establishes that the decedent's total disability resulted
23 from the natural progression of pre-existing aging processes.
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26 In any event, the cause of the worsening of the decedent's back condition has heretofore
27 been established as a matter of law and is not open for further inquiry herein. On July 12, 1960, the
28 Department, in response to an application by the decedent to reopen his claim for aggravation filed
29 on June 3, 1960, adjudicated that there was no aggravation due to his industrial injury, but that his
30 condition was attributable to a "natural progression of the pre-existing osteoarthritis, osteoporosis,
31 and degenerative changes about the discs." The application to reopen the claim had been
32 submitted on the decedent's behalf by the petitioner's witness herein, Dr. Mooney, who felt the
33 decedent's back condition had worsened due to his injury to the extent that he was permanently
34 and totally disabled as of that time (June, 1960). The Supervisor's order of July 12, 1960, rejected
35 this contention and attributed his existing back condition and disability to the natural progression of
36 aging processes. No appeal was prosecuted from the Supervisor's order of July 12, 1960, and it
37 accordingly became a complete and final adjudication. It is clear that a widow's cause of action
38 under the Act is a new, original right that is independent of the rights of the workman so that his
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1 failure to file a claim or to secure a final adjudication as to any aspect thereof, does not foreclose
2 his widow from filing a claim in her own right and litigating any matter that was not prosecuted to a
3 final judgment in the workman's claim. Beels v. Department of Labor and Industries, 178 Wash.
4 301; McFarland v. Department of Labor and Industries, 188 Wash. 357; Devlin v. Department of
5 Labor and Industries, 194 Wash. 549. However, it is also clear that the widow is bound under the
6 principle of res judicata as to any matter that was prosecuted to a final adjudication in the
7 workman's claim and is essential to a recovery by the widow in her own cause of action. Ek v.
8 Department of Labor and Industries, 181 Wash. 91

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10 In the instant matter, the petitioner's contention of permanent and total disability as of the
11 date of the decedent's death is based upon the same pathological conditions (osteo-arthritis,
12 osteoporosis and degenerative disc disease) that were segregated as unrelated to the decedent's
13 injury by the Department's order of July 12, 1960. The causal relationship of such pathological
14 conditions to the decedent's industrial injury is essential to the petitioner's right to a recovery, and
15 since no appeal was taken from the Supervisor's order of July 12, 1960, it became a final
16 Adjudication and res judicata upon the point. Ek. v. Department of Labor and Industries, supra.

23 FINDINGS OF FACT

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25 After reviewing the entire record in light of the exceptions filed, the Board makes the
26 following findings:
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- 28 1. On August 4, 1953, the decedent injured his back while lifting a
29 conveyor's shaft during the course of his employment with the
30 Northwestern Improvement Company. His claim was allowed and on
31 July 9, 1954, the Supervisor of Industrial Insurance issued an order
32 closing the claim without an award for permanent partial disability.
33 Following a protest by the decedent, the Supervisor issued an order on
34 October 25, 1954, reopening the claim to award the claimant a
35 permanent partial disability allowance equal to 10% of the maximum
36 allowable for unspecified disabilities, and thereupon closed the claim.
- 37 2. On April 27, 1956, the decedent filed an application to reopen his claim
38 for aggravation, and on June 6, 1956, the supervisor issued an order
39 reopening the claim for treatment and further action. On June 11, 1957,
40 the Supervisor issued an order closing the claim with a permanent
41 partial disability award of 20% of the maximum allowable for unspecified
42 disabilities, less the prior award.
- 43 3. On December 19, 1957, the decedent filed an application to reopen his
44 claim for aggravation, and on March 18, 1958, the Supervisor issued an
45 order reopening the claim for treatment and further action. On March
46 11, 1959, the Supervisor issued an order closing the claim without
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1 further award for permanent partial disability. On May 15, 1959, the
2 decedent file a notice of appeal to the Board. On March 18, 1960, the
3 Board issued an order dismissing the decedent's appeal.

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5 4. On June 3, 1960, the decedent filed an application to reopen his claim
6 for aggravation, and on July 12, 1960, the Supervisor issued an order
7 denying the application for the reason that: "The condition is attributable
8 to a natural progression of the pre-existing osteoarthritis, osteoporosis,
9 and degenerative changes about the discs." No appeal was taken from
10 this order.

11 5. On May 5, 1961, the decedent filed an application to reopen his claim
12 for aggravation, and on July 3, 1961, the Supervisor issued an order
13 denying the application. On August 3, 1961, the decedent filed a notice
14 of appeal and thereafter died on December 23, 1962. Upon notification
15 of the death, this Board issued an order on February 14, 1962,
16 dismissing the decedent's appeal.

17 6. On February 27, 1962, the petitioner filed an application for a widow's
18 pension. On March 13, 1962, the Supervisor issued an order denying
19 the application on the following grounds:

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21 "WHEREAS the cause of death, as shown on the official death
22 certificate, was acute coronary artery disease due to chronic coronary
23 disease of 40 years duration, neither of which are related in any manner
24 to the condition resulting from the injury of August 4, 1953, and

25 WHEREAS the deceased had been unable to work for many months
26 prior to his death but that inability to work was not due to the injury of
27 August 4, 1953 but was due to the normal progression of pre-existing
28 conditions of osteo-arthritis, osteoporosis, degenerative changes about
29 the spinal discs and his age and he was not therefore totally
30 permanently disabled by reason of the injury of August 4, 1953 at the
31 time of death,....."

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33 On May 1, 1962, the petitioner filed a notice of appeal, and on May 24,
34 1962, the Board issued an order granting the appeal. On February 26,
35 1965, a hearing examiner of the Board issued a Proposed Decision and
36 Order. A Statement of Exceptions thereto was duly filed by the
37 Department of Labor and Industries on March 26, 1965.

38 7. The decedent's worsened back condition was due to the normal
39 progression of pre-existing conditions of osteoarthritis, osteoporosis,
40 and degenerative disc disease, and was not the result of his industrial
41 injury of August 4, 1953.

42 **CONCLUSIONS OF LAW**

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44 Based upon the foregoing findings, the Board makes the following conclusions:

45 1. The Board has jurisdiction of the parties and subject matter of this
46 appeal.
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2. The Supervisor's order of July 12, 1960, wherein it adjudicated that the decedent's existing back condition and inability to work was attributable to a natural progression of the pre-existing osteoarthritis, osteoporosis, and degenerative changes about the discs, is res judicata and forcloes the petitioner herein from predicating her claim that the decedent was permanently and totally disabled as a result of his industrial injury at the date of his death upon the aforesaid conditions.
 3. The decedent was not permanently and totally disabled as a result of his industrial injury of August 4, 1953, within the meaning of the Workmen's Compensation Act.
 4. The order of the Supervisor of Industrial Insurance dated March 13, 1962, rejecting this claim for a widow's pension is correct and should be sustained.

It is so ORDERED.

Dated this 28th day of April, 1966.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
J. HARRIS LYNCH Chairman

/s/
R. H. POWELL Member

/s/
R. M. GILMORE Member