Flores, Antonio, Dec'd

SURVIVOR'S BENEFITS

Post-hoc consideration of worker's ability to complete a vocational program

Upon a worker's death and claim closure, the worker's prospective ability to complete a vocational program before death is not a consideration when determining whether the worker was permanently totally disabled at the time of death. ***….In re Antonio Flores, Dec'd,* BIIA Dec., 20 28637 (2022)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ANTONIO G. FLORES DEC'D	**)**	**DOCKET NOS. 20 28637, 20 28638, 20 28639 & 20 28730**
	)	
CLAIM NOS. SJ-52602 & SK-82643	**)**	**DECISION AND ORDER**

In 2015, Antonio Flores suffered an industrial injury to his left knee while installing insulation for Masco Corporation. The Department of Labor and Industries allowed his industrial insurance claim under Claim No. SJ-52602 with the condition of degenerative joint disease accepted by the Department. In 2017, Mr. Flores filed an occupational disease claim for bilateral knee degenerative joint disease, which the Department allowed under Claim No. SK-82643. Mr. Flores passed away on July 20, 2018, from a condition unrelated to his industrial injury. The Department thereafter issued four orders – two orders for each claim. The Department determined Mr. Flores was not totally permanently disabled at the time of his death and denied his surviving widow's beneficiary application. Mrs. Flores appealed all four orders. Our industrial appeals judge determined the Department was incorrect and found Mr. Flores was permanently totally disabled at the time of his death, directed the Department to place him on the pension rolls and to accept Mrs. Flores's beneficiary application. The self-insured employer, Top Build Corporation, filed a Petition for Review. It argues that the record shows Mr. Flores was employable based upon occupational possibilities, which they claim would have been practical employment opportunities had he survived to complete vocational retraining. We agree with our industrial appeals judge's determination and grant review only to reiterate that upon a worker's death and claim closure, the worker's prospective ability to complete a vocational program before death is not a consideration when determining whether the worker was permanently totally disabled at the time of death. The three Department orders dated January 17, 2020, and one order dated January 21, 2020, are **REVERSED AND REMANDED** with direction to determine Mr. Flores to have been permanently totally disabled as of July 20, 2018, under Claim Nos. SJ-52602 and SK-82643, and to accept Mrs. Flores's beneficiary application for surviving spouse benefits.

DISCUSSION

Mrs. Elida Flores was required to show that at the time of his death Mr. Flores was incapable of reasonable continuous, gainful employment due to his industrially related physical impairments when also considering his age, education, training and experience. A worker establishes entitlement to total disability where they show those physical impairments, in conjunction with those demographic

considerations, preclude their employment in a given labor market.[1] Conversely, if a worker is capable of general work – meaning within the workers capabilities, training, and experience – and that work is available within the claimant's labor market, then they are not permanently totally disabled despite the light or sedentary nature of the work.

As pointed out by our industrial appeals judge, the unrebutted medical testimony shows Mr. Flores could not return to his work in the construction industries as an insulation installer. The primary dispute concerns whether Mr. Flores was capable of completing a vocational retraining program which *may* have rendered him capable of several proposed employments. The self-insured employer, Top Build Corporation, presented the testimony of Craig Bock, a vocational rehabilitation counselor who forensically reviewed Mr. Flores's vocational retraining plan in June 2019. Mr. Bock necessarily reviewed only a partial vocational plan because Mr. Flores passed away before the plan development could be completed.[2] According to Mr. Bock, the Department was – at best – "getting close to the possibility of a case aide retraining plan" for Mr. Flores when he passed away.[3] After Mr. Flores passed away, Mr. Bock presented two possible job goals – general office clerk and medical receptionist -- to Steven R. English, M.D., (Mr. Flores's attending provider) to confirm they were medically appropriate given the physical restrictions imposed by the industrial injury and occupational diseases.

Mr. Flores was 65 years old at the time of his death on July 20, 2018. His formal education ended after the eighth grade. His work experience was overwhelmingly in heavy labor, with the vast majority being in construction work via insulation installation. He had very limited ability to read and write English, though he was capable of communicating in English with co-workers and clients on job-site when needs required. He had no computer or keyboarding experience to speak of and was unable to perform routine activities that required computer acumen without assistance. Mr. Flores's installer job required him to stoop, kneel, crawl, and squat. After the Department accepted both his industrial injury and occupational disease claim, Mr. Flores underwent total knee replacement surgery in late 2016 for the left knee and early 2018 for the right. After a period of convalescence to allow for a recovery assessment, the attending provider Dr. English permanently restricted Mr. Flores from using ladders, squatting, kneeling, or crawling – precluding his return to his former employment.[4]

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[1] *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286 (1972).
[2] Bock Dep. at 28.
[3] Bock Dep. at 30.
[4] English Dep. at 24.

Top Build's argument necessarily hinges on Mr. Flores's hypothetical ability to complete the partially developed vocational plan, which itself assumes the completion of a GED and several industry specific courses in computer use, editing and transcriptions, records management, and business communications. We have previously held that a claimant's burden of proof does not include proving they would not be employable even if retrained; said differently, the Department's "occupation prognosis" is not a factor in determining whether a worker is totally permanently disabled when a claim is closed.[5] We hold that this reasoning extends to the circumstance where a worker dies. Thus, Mrs. Flores was not required to show the impact, if any, the partially developed vocational plan might have had on his employment prospects. More recently, we were presented with a similar circumstance where the worker passed away six-weeks short of completing their vocational retraining program.[6] In that matter we determined the worker's employment capability – or lack thereof – was not changed by their partial completion of the vocational plan and they were unable of continuous gainful employment at the time of their death.

It is uncontested Mr. Flores never *started* the proposed vocational plan before his death; the parties' respective vocational testimony is entirely directed at Mr. Flores's hypothetical ability to complete a vocational plan. Putting aside the question of whether he could have completed the Department's ambitious vocational program, we reaffirm the rule that a worker's prospective ability to complete a vocational program is not a factor in determining whether they are permanently totally disabled. Based on the evidence presented, Mr. Flores did not have the capability to work as either a medical receptionist or general office clerk at the time of his death on June 20, 2018. We are satisfied that, when considering his unchallenged medical restrictions in conjunction with his age, education, training, and singular work history, Mr. Flores was permanently totally disabled as of June 20, 2018.

DECISION

In Docket No. 20 28637, the claimant's beneficiary, Elida Flores, filed a timely protest with the Department of Labor and Industries. The Department forwarded it to the Board of Industrial Insurance Appeals as an appeal. The claimant appeals a Department order dated January 17, 2020. In this order, the Department determined that Mr. Flores was not totally and permanently disabled due to his industrial injury at the time of his death. This order is incorrect and is reversed and remanded.

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[5] *In re Tesfai G. Ukbagergis* Dckt. No. 09 20737 (April 21, 2011).
[6] *In re Shaw E. Smith, Dec'd*, Dckt. No. 11 22178 (February 11, 2013).

In Docket No. 20 28638, the claimant beneficiary, Elida Flores, filed a timely protest with the Department of Labor and Industries. The Department forwarded it to the Board of Industrial Insurance Appeals as an appeal. The claimant appeals a Department order dated January 21, 2020. In this order, the Department affirmed an order closing the claim with an award for permanent partial disability. This order is incorrect and is reversed and remanded.

In Docket No. 20 28639, the claimant beneficiary, Elida Flores, filed a timely protest with the Department of Labor and Industries. The Department forwarded it to the Board of Industrial Insurance Appeals as an appeal. The claimant appeals a Department order dated January 17, 2020. In this order, the Department found Mr. Flores was not totally and permanently disabled due to his industrial injury at the time of his death. This order is incorrect and is reversed and remanded.

In Docket No. 20 28730, the claimant beneficiary, Elida Flores, filed a timely protest with the Department of Labor and Industries. The Department forwarded it to the Board of Industrial Insurance Appeals as an appeal. The claimant appeals a Department order dated January 21, 2020. In this order, the Department closed the claim with permeant partial disability. This order is incorrect and is reversed and remanded.

FINDINGS OF FACT

1. On February 2, 2021, an industrial appeals judge certified that the parties agreed to include the Jurisdictional Histories in the Board record solely for jurisdictional purpose.
2. On February 11, 2015, Mr. Flores sustained an industrial injury when he bent and twisted his left knee while installing insulation. The injury aggravated his underlying left knee degenerative joint disease.
3. Mr. Flores developed bilateral knee degenerative joint disease that arose naturally and proximately out of the distinctive conditions of his employment as an insulation installer.
4. On July 20, 2018, Mr. Flores died at the age of 65, from a heart attack. Mr. Flores's death was unrelated to his work.
5. As of July 20, 2018, Mr. Flores's conditions proximately caused by the industrial injury and the occupational disease were fixed and stable.
6. On July 20, 2018, Mr. Flores was 65 years old and had an eighth grade education. His work history consisted of heavy work, installing insulation. His ability to read and write in English was limited and he had little experience using computers.
7. As of July 20, 2018, Mr. Flores could perform sedentary work but could not climb ladders, squat or crawl.

8. As of July 20, 2018, Mr. Flores was incapable of completing a proposed two year vocational plan to become a medical receptionist or general office clerk due to his limited education, limited computer skills, and limited ability to read or write in English.

9. Mr. Flores was unable to perform or obtain gainful employment as of July 20, 2018, due to the combined effects of his industrial injury and occupational disease and taking into account his age, education, work experience.

CONCLUSIONS OF LAW

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

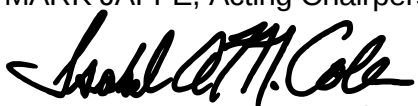
2. As of July 20, 2018, Mr. Flores was a permanently and totally disabled worker within the meaning of RCW 51.08.160.

3. The Department orders under claim number SJ-52602 dated January 17, 2020, and January 21, 2020, are incorrect and are reversed. The Department orders under Claim No. SK-82643 dated January 17, 2020, and January 21, 2020, are incorrect and reversed. This matter is remanded to the Department to find Mr. Flores permanently and totally disabled as of July 20, 2018, the date of his death; to accept Mrs. Flores's beneficiary application for surviving spouse benefits; and to take any further action in accordance with the law and the facts.

Dated: March 17, 2022.

BOARD OF INDUSTRIAL INSURANCE APPEALS

MARK JAFFE, Acting Chairperson



ISABEL A. M. COLE, Member

Addendum to Decision and Order
In re Antonio G. Flores
Docket No. 20 28637, 20 28638, 20 28639 & 20 28730
Claim No. SJ-52602 & SK-82643

Appearances

Beneficiary, Elida Flores, by Walthew Law Firm, per Michael J. Costello

Self-Insured Employer, Topbuild Corporation, by MacColl Busch Sato, P.C., per Lindsay E. Landstrom

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 self-insured employer filed a timely Petition for Review of a Proposed Decision and Order issued on December 8, 2021, in which the industrial appeals judge reversed and remanded the Department order(s) dated January 17, 2020 and January 21, 2020. The claimant filed a response to the employer'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.