Qualls, John

AGGRAVATION (RCW 51.32.160)

Temporary worsening

A prior finding that the worker's condition became aggravated requiring reopening of the claim for treatment establishes only a temporary increase in disability. In order to obtain an increased permanent disability award, the worker must still present proof of aggravation resulting in an increase in permanent disability. **….*In re John Qualls*, BIIA Dec., 28,430 (1969)** [dissent]

RES JUDICATA

Aggravation

The reopening of a claim for treatment does not establish ipso facto an increase in permanent disability but only the existence of a temporary exacerbation requiring remedial medical treatment. **….*In re John Qualls*, BIIA Dec., 28,430 (1969)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JOHN R. QUALLS	**)**	**DOCKET NO. 28,430**
	)	
CLAIM NO. C-483094	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, John R. Qualls, by
Walthew, Warner & Keefe, per
Charles F. Warner and Thomas P. Keefe

Employer, A. A. Brewer Company,
None

Department of Labor and Industries, by
The Attorney General, per
Allan W. Munro, Dinah Campbell, Earl P. Lasher, and William T. Scharnikow, Assistants

This is an appeal filed by the claimant on April 10, 1967, from an order of the Department of Labor and Industries dated March 28, 1967, which closed his claim with no additional permanent partial disability. **SUSTAINED**.

DECISION

This matter is before the Board for review and decision on a timely Statement of Exceptions filed by the claimant to a Proposed Decision and Order issued by a hearing examiner for this Board on July 9, 1968, in which the order of the Department dated March 28, 1967, was sustained.

The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

This is an aggravation case. The question facing the Board on this appeal is whether or not the claimant's conditions resulting from his industrial injuries of December 10, 1957, and January 9, 1958, worsened between March 9, 1960, and March 28, 1967.

Claimant contends that between March 9, 1960 and March 28, 1967, his condition did in fact worsen and that on the latter date he was permanently and totally disabled as a result of his industrial injuries. In support of this contention he presented the testimony of two medical witnesses. The first of these was Dr. J. Harold Brown, a general practitioner of Seattle, and the other was Dr. Ernest Burgess, an orthopedic specialist. Dr. Brown had treated the claimant since early 1959 up to and including December 14, 1959. It does not appear that he provided any treatment between that date and an examination performed by him on April 24, 1967. Dr. Burgess

on the other hand, first saw the claimant in April of 1963. He began treatment of him in November 1965, and continued to treat him until September of 1967.

It is difficult to distill from the testimony of Dr. Brown any objective criteria upon which he based his opinion that the claimant's condition was worse in 1967 than it had been in March of 1960. He found what he referred to as voluntarily restricted motion that added to limitation of motion in all areas of his body, not only the neck but elsewhere. Other findings made in 1967 do not appear to be significantly different from those made by Dr. Brown on his last examination of the claimant in December of 1959.

Dr. Burgess found that during the period of his treatment the claimant deteriorated generally as far as his over-all physical and mental psychological status was concerned. Dr. Burgess did not, however, state that this deterioration was the result of factors related to the industrial injury. He did state that the claimant was totally unemployable in March of 1967.

It is evident from Dr. Burgess' testimony that a good portion of his disability rating is based upon the claimant's psychological state. He was unable to find any evidence of disuse of the claimant's extremities and thought the claimant's neurological picture remained unchanged over the period of his treatment.

At some time in 1929, the claimant had suffered a severe head injury which ultimately resulted in surgical intervention in the skull. That the claimant has suffered since that time from severe problems directly related to that traumatic incident is not here in question. It is firmly established by this record.

To prevail in this appeal, the claimant must show: (1) the causal relationship between the injury and the subsequent disability by medical testimony; (2) by medical testimony based in part upon objective findings that an aggravation of the injury resulted in increased disability; (3) by medical testimony that the increased aggravation occurred between the terminal dates of the aggravation period; (4) by medical testimony, some of it based upon objective symptoms which existed on or prior to the closing date, that his disability on the date of the closing order was greater than the Department found it to be. Moses v. Department of Labor and Industries, 44 Wn. 2d 511; Phillips v. Department of Labor and Industries, 49 Wn. 2d 195; Naillon v. Department of Labor and Industries, 65 Wn. 2d 544.

It is rules 2 and 4 above that we are here concerned with.

In this Board's view, the claimant has not established by medical testimony, some of it based upon objective symptoms, that there has been an aggravation or increase in claimant's disability resulting from his industrial injuries. It is also our view that the opinions of the claimant's medical witnesses of increase in disability are not based on medically objective criteria in any part.

Although Dr. Brown was the claimant's attending physician prior to 1960, there is no evidence before this Board that he served in that role between 1960 and 1967, when he performed his last physical examination. Thus, it is our view that his opinion carries no more weight in this matter on the question of aggravation of condition than does that of the medical witnesses who testified on behalf of the Department. Dr. Burgess, on the other hand, was the claimant's attending physician from 1963 through 1967. We have carefully studied his testimony, seeking therein to find some unequivocal statement which would satisfy the above-enumerated rules concerning the requirements for the establishment of aggravation in cases such as this. We have been unable so to do.

Taking the record as a whole, it is this Board's view that the deterioration of the claimant's mental condition, and any deterioration of his physical condition subsequent to 1960 (when the claimant was fifty-three years old), is more probably than not related to and attributable to the combination of his advancing age and the mental condition suffered by the claimant, which pre-existed the industrial injuries herein by some twenty-eight years.

One issue remains to be dealt with. As previously stated, this matter was originally closed on March 9, 1960, with an award of 35 per cent of the maximum allowable for unspecified disabilities. Thereafter, on November 5, 1963, the claimant filed an application to reopen his claim for aggravation. This was denied on March 19, 1964. An appeal was taken from this denial and, on August 19, 1965, a Proposed Decision and Order was issued by a hearing examiner for this Board (later adopted by Board order dated September 17, 1965). Finding No. 4 of said Proposed Decision and Order read as follows:

> "4. Between March 9, 1960, and March 19, 1964, claimant's condition due to his industrial injuries of December 7, 1957, and January 9, 1958, became aggravated in such degree that on or before the latter date his condition was no longer fixed and required treatment and further diagnostic studies."

The claimant contends that this finding establishes and makes res judicata the fact the claimant had aggravation of his condition between March of 1960 and March of 1967. This fact, the claimant contends, makes unnecessary any proof of aggravation as set forth hereinabove.

We disagree. The above-quoted finding does no more than state the fact upon which the examiner based his order to remand the claim to the Department for further treatment and diagnostic studies. It is not a necessary implication that the aggravation necessary to establish need for further treatment establishes ipso facto an increase in permanent disability. Needless to say, the opposite implication is equally appropriate, that is, that the remand for treatment will eliminate the problems for which the treatment is required. At best, the above-quoted finding establishes that during a period of time within the aggravation period the claimant suffered a temporary exacerbation subject to remedial medical action. The implication that the interim remand by this Board to the Department for further treatment establishes the aggravation necessary in such a case as this was not acceptable to the Supreme Court in the case of Dinnis v. Department of Labor and Industries, 67 Wn. 2d 654 (1965). That, too, was an aggravation case, and between the aggravation dates the claimant had received a back fusion. The court could find no reason to dispense with proof of aggravation in that situation, and thereby, impliedly, adopted the rationale that an interim reopening for treatment does not establish that aggravation necessary to support a claim for increased disability on the second terminal date.

FINDINGS OF FACT

After a review of the entire record, the Board finds:

1. The claimant, John R. Qualls, sustained injuries on December 10, 1957, and January 9, 1958, in the course of his employment for A. A. Brewer of Renton, Washington. Two accident reports for these injuries were processed by the Department of Labor and Industries under one claim number, C-483904. The claim was allowed, medical treatment provided, and time-loss compensation paid, and on August 29, 1958, the Department entered a further order adhering to the prior closing order of July 25, 1958. On September 17, 1958, claimant appealed to this Board and on March 23, 1959, the Board entered an order remanding the claim to the Department of Labor and Industries with direction to reopen the claim to provide the claimant with further medical treatment. Pursuant to this Board order, on April 1, 1959, the Department entered an order reopening the claim for treatment and action as indicated. On March 9, 1960, the Department entered a final order closing the claim with no additional permanent partial disability award. On April 1, 1960, the claimant appealed to this Board and on

March 7, 1962, this Board reversed the Department's order and instructed the Department to pay the claimant an additional 10% of the maximum allowable for unspecified disabilities. On April 23, 1962, the Department issued an order in compliance with the Board order. Thereafter, on March 23, 1962, the claimant appealed the Board order to the superior court, and on February 7, 1963, the superior court awarded the claimant 35% of the maximum allowable for unspecified disabilities, less prior awards paid. There-after, on March 19, 1963, the Department issued an order in compliance with the superior court judgment.

2. On November 5, 1963, the claimant filed an application to reopen his claim for aggravation and on March 19, 1964, the Department issued an order denying this application. On April 9, 1964, the claimant appealed to this Board. On August 19, 1965, a Proposed Decision and Order was issued by a hearing examiner for this Board, which remanded the claim to the Department for further treatment and diagnostic studies. On September 17, 1965, the Board issued an order adopting the Proposed Decision and Order, and on October 14, 1965, the Department issued an order in compliance therewith. On March 28, 1967, the Department issued an order closing the claim with no further permanent partial disability award. On April 10, 1967, notice of appeal was filed with this Board, and on April 28, 1967, this appeal was granted.

3. Appellate proceedings were conducted before the Board of Industrial Insurance Appeals, and on July 9, 1968, a hearing examiner for this Board entered a Proposed Decision and Order in connection with this appeal. Thereafter, within the period of time provided by law, exceptions were filed and the case referred to the Board for review as provided by RCW 51.52.106.

4. Incorporated in the Proposed Decision and Order issued in a prior appeal in this matter on August 19, 1965, (adopted by the Board on September 17, 1965) was the following pertinent finding:

"Between March 9, 1960, and March 19, 1964, claimant's condition due to his industrial injuries of December 7, 1957, and January 9, 1958, became aggravated in such degree that on or before the latter date his condition was no longer fixed and required treatment and further diagnostic studies."

5. Prior to his industrial injury of December 10, 1957, the claimant herein had suffered from a severe injury to his skull in 1929 causing traumatic brain damage and presently has residual intercranial scarring therefrom. Residuals of this 1929 injury continued through the subsequent years up to and including the months of December 1957 and January 1958, and were chronic, and permanent. Furthermore, the claimant suffered from pre-existing epileptic seizures, which were not related to his industrial

injuries of December 10, 1957 and January 9, 1958, but are in fact due to the 1929 injury.

6. Between March 9, 1960 and March 28, 1967, there was no increase in the claimant's permanent disability resulting from his industrial injuries of December 10, 1957, and January 9, 1958, of an organic nature, manifested by objective medical symptoms.

7. Between March 9, 1960 and March 28, 1967, there was no increase in the claimant's mental or psychiatric disability which was the result of or attributable to his industrial injuries of December 10, 1957, and January 9, 1958, nor was there any increase in brain or nerve damage during said period which was related to said injuries.

8. The claimant failed to produce substantial medical evidence based upon objective findings to prove any aggravation between March 9, 1960 and March 28, 1967, due to his industrial injuries.

9. On March 28, 1967, the claimant's disabilities attributable to his industrial injuries of December 10, 1957, and January 9, 1958, were not greater in degree than 35% of the maximum allowable for unspecified disabilities as had previously been awarded to him.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, this Board concludes:

1. This Board has jurisdiction of the parties and subject matter of this appeal.

2. Between March 9, 1960 and March 28, 1967, the claimant's conditions due to his industrial injuries of December 10, 1957, and January 9, 1958, did not become aggravated within the meaning of the Washington Industrial Insurance Act.

3. The order of this Board dated September 17, 1965, adopting a Proposed Decision and Order by an examiner for this Board issued on August 19, 1965, did not, by its findings, make res judicata that the claimant had suffered any increased permanent disability between March 9, 1960 and March 28, 1967. (See: Dinnis v. Department of Labor and Industries, 67 Wn. 2d 654.

4. The order of the Department of Labor and Industries issued herein on March 28, 1967, is correct and should be sustained.

It is so ORDERED.

Dated this 7th day of April, 1969.

BOARD OF INDUSTRIAL INSURANCE APPEALS
/s/
ROBERT C. WETHERHOLT Chairman
/s/
R.M. GILMORE Member

DISSENTING OPINION

I believe there is sufficient credible evidence in the record to reasonably conclude that the claimant's permanent disability, causally related to the industrial injury, probably did worsen between the appropriate terminal dates. I would accept the opinion of Dr. J. Harold Brown, who had a very good basis for his medical opinion; he treated the claimant before the first terminal date and examined him again on or about the second terminal date. Dr. Brown's opinion is supported by that of Dr. Ernest Burgess. The weight of the evidence is such that this claim should be reopened and the claimant awarded a permanent total disability pension under the Act.

Dated this 7th day of April, 1969.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
R.H. POWELL Member