Weighall, Charles

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Application to reopen treated as protest

An application to reopen a claim, filed in response to a Department closing order and within the time allowed for filing an appeal, can be construed as a request that the Department reconsider its closure of the claim, and requires the Department to issue a further final order. **….*In re Charles Weighall*, BIIA Dec., 29,863 (1970)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CHARLES WEIGHALL	**)**	**DOCKET NO. 29,863**
	)	
CLAIM NO. F-154392	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Charles O. Weighall, by
Walthew, Warner & Keefe, per
John J. Costello, Stephen Reilly, and Eugene Arron

Employer, Wildhaber-Howard Buck & Son Sales, by
Murray, Armstrong and Vander Stoep, per
James Turner

Department of Labor and Industries, by
The Attorney General, per
Robert G. Swenson, Gosta E. Dagg,
Thomas A. Prediletto, and Theodore A. Ripley, Assistants

This is an appeal filed by the claimant on December 19, 1967, from an order of the Department of Labor and Industries dated November 28, 1967, which denied reopening the claim and segregating and denying responsibility for a urinary tract condition. **REVERSED AND REMANDED**.

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 April 30, 1969, in which the order of the Department dated November 28, 1967 was sustained on the basis that the claimant had not shown aggravation of condition due to the industrial injury between June 29, 1967 and November 28, 1967.

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.

The issue presented by this appeal is not one of aggravation, as found by our hearing examiner's Proposed Decision and Order. In filing a document (Exhibit No. 1) with the Department of Labor and Industries on August 21, 1967, the claimant complied with the Department's admonition in its closing order of June 29, 1967, that "Any request for Departmental reconsideration of this order must be made within 60 days. A further appealable order will follow such request."

A careful reading of the information filled in by the claimant and his attending physician on Exhibit No. 1 clearly indicates that they did not intend the form entitled "Application to Reopen Claim for Aggravation of Condition" to be construed by the Department as any more than a request for the Department to reconsider its closing order pursuant to the admonition issued by the Department, and it is ridiculous to say that because the claimant and his attending physician used a Department form in an incorrect manner, the claimant is precluded from making a prima facie case. The Department's order of June 29, 1967, after paying the claimant a closing disability award, stated "No further notice will be issued relative to the determination of permanent partial disability," but this does not mean the Department would not give reconsideration of its order upon a request being made within 60 days.

Our hearing examiner's Proposed Decision and Order recognizes the position taken by the claimant and by the Department in the use of the form, which was admitted in evidence for limited jurisdictional purposes as Exhibit No. 1. Our original hearing examiner (Mr. Tingvall) granted claimant's counsel's motion to consider the appeal a direct one (BR 15), but our hearing examiner (Mr. Driscoll) who issued the Proposed Decision and Order, totally ignored this ruling and accepted the Department's and employer's theory that the issue before the Board required the showing of an aggravation of condition. Mr. Driscoll, in his Proposed Decision and Order, then proceeded to find that the claimant had not made a prima facie case.

As already indicated, we think that Mr. Driscoll erred in not carefully reading the Department's closing order of June 29, 1967, the document filed as Exhibit No. 1, and the Department's final closing order of November 28, 1967. We have held before, and continue to hold, that where the Department enters an order stating:

> "Any request for Departmental reconsideration of this order will follow such request."

That this invitation by the Department when responded to by a claimant or his employer requires the Department then to issue a further appealable order, and the statute of limitations does not run until such further appealable order is issued. As near as we can determine from the jurisdictional facts presented in this record, the next appealable order issued by the Department was on November 28, 1967; thus, this is a direct appeal. As to the extent of disability, it makes no difference whether the direct appeal is from the Department's order of June 29, 1967, or from its later order of November 28, 1967, since the evidence presented by both the claimant and the

Department indicates that the extent of the claimant's permanent disability due to his industrial injury of 1963 was essentially the same on both dates.

The Department's order of November 28, 1967, segregated and denied responsibility for a "present urinary tract condition" as unrelated to the injury covered by the claim. We can find no medical evidence in the record to support such a segregation. The testimony of Dr. Ralph V. Stagner, a urologist, who was an attending surgeon, stated "I would only say that I did not ever arrive at a urological diagnosis that would account for his symptoms." (BR 141)

A careful reading of the medical evidence presented by both parties in this appeal convinces us that the claimant, as a result of his industrial injury of December 17, 1963, received serious internal injuries, some of which required surgical repair, and if we can believe the claimant's testimony, his passing of blood increased after the multiple surgeries required by his 1963 injury. Finding no medical basis for the Department's segregation and denial of responsibility paragraph in its order of November 28, 1967, we will reverse it.

It is obvious from the review of the record on this appeal that the June 29, 1967 closing evaluation of 50 per cent of the maximum allowable for unspecified disabilities for the claimant's permanent partial disability, attributable to his industrial injury of December 17, 1963, was based on an examination by Dr. Myron Kass, a psychiatrist, who examined Mr. Weighall at the request of the Department on April 7, 1967. Dr. Kass received a history of the claimant's earlier industrial and non-industrial injuries, his family background, his educational and work experience, and reviewed the Departmental file pertaining to the 1963 industrial injury and, after examining the claimant, diagnosed a post-traumatic conversion reaction, which was chronic, severe, fixated and referable to symptoms in the left groin and hip and back and left testicle area. Further, in his testimony, however, Dr. Kass stated that the claimant was no longer available on the open labor market and would only be able to work on a limited self-rehabilitation basis where he could regulate his own activities, hours and exertion. Based on Dr. Kass' testimony, we believe the claimant was rendered permanently totally disabled by the effects of his December 17, 1963 industrial injury, super-imposed upon his prior industrially and non-industrially related conditions.

In our review of the record on this appeal, we have read the testimony of Dr. Peter Fisher, who examined the claimant on March 11, 1968, and find it of no value whatever in determining the present appeal.

In all probability, this case is a combined effects case from the standpoint of Wildhaber-Howard Buck & Son Sales, the employer herein, but we need not at this time pass upon the question of second injury fund relief to the employer since the Department has not had an opportunity of considering the same.

FINDINGS OF FACT

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

1. The claimant sustained severe internal injuries resulting in a left inguinal hernia in the course of his employment as a mechanic with Wildhaber-Howard Buck & Son Sales, the employer, on December 17, 1963. The claim based thereon was allowed, time loss compensation was paid, several surgery repairs were performed, and on June 29, 1967 (mailed July 6, 1967), the Department of Labor and Industries issued an order closing the claim with a permanent partial disability award of 50% of the maximum allowable for unspecified disabilities. On August 21, 1967, the claimant complied with the Department's admonition in its closing order of June 29, 1967, that "Any request for Departmental reconsideration of this order must be made within sixty days. A further appealable order will follow such request," by filing a document (Exhibit No. 1) with the Department of Labor and Industries.

2. On November 28, 1967, the Department entered an order reaffirming its June 28, 1967 order and segregating and denying responsibility for a "present urinary tract condition" as unrelated to the injury covered by the claim. On December 19, 1967, the claimant filed his notice of appeal. On January 5, 1968, the Board entered an order granting the appeal.

3. Appellate proceedings were conducted before the Board of Industrial Insurance Appeals, and on April 30, 1969, 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. The information filled in by the claimant and his attending physician on Exhibit No. 1 clearly indicates that they did not intend the form entitled "Application to Reopen Claim for Aggravation of Condition" to be construed by the Department as any more than a request for the Department to reconsider its closing order pursuant to the admonition issued by the Department. We find as a fact that the next appealable order was issued by the Department on November 28, 1967, and therefore, the appeal is direct with no aggravation period involved.

5. As a result of his industrial injury of December 17, 1963, the claimant has undergone multiple surgeries for a left inguinal hernia, including the removal of the left testicle to strengthen the site of the hernia repair, and has sustained a post-traumatic conversion reaction, which was

diagnosed as chronic, severe, fixated and referable to symptoms in the left groin and hip and back and left testicle area by Dr. Myron Kass.

6. The permanent physical and psychiatric disability attributable to the December 17, 1963 industrial injury, combined with the effects of the permanent disability from his prior back injury received while employed by the Northern pacific Railroad, his general health situation prior to the industrial injury of 1963, and his limited education and work experience, has permanently removed the claimant from the labor market, as he can no longer carry on a full-time occupation on a reasonably continuous basis.

7. There is no medical evidence in the record on this appeal to support the Department's segregation and denial of responsibility for a "present urinary tract condition."

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Board concludes:

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

2. The issue presented by this appeal is the extent of claimant's disability on or about June 29, 1967, resulting from his industrial injury of December 17, 1963.

3. The orders of the Department of Labor and Industries dated June 29, 1967 and November 28, 1967, are incorrect, and must be reversed and this claim remanded to the Department of Labor and Industries with direction to place the claimant on the pension rolls as a permanently totally disabled workman under the provisions of the Washington Workmen's Compensation Act.

It is so ORDERED.

Dated this 3rd day of March, 1970.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
ROBERT C. WETHERHOLT Chairman

/s/_____
R.H. POWELL Member

/s/_____
R.M. GILMORE Member

Revised Code of Washington, Section 51.52.120(2) provides:

"If, on appeal to the board, the order, decision or award of the department is reversed or modified and additional relief is granted to a workman or beneficiary, or in cases where a party other than the workman or beneficiary is the appealing party and the workman's or beneficiary's right to relief is sustained by the board, the board shall fix a reasonable fee for the services of his attorney in proceedings before the board if written application therefor is made by the attorney, workman or beneficiary. In fixing the amount of such attorney's fee, the board shall take into consideration the fee allowed, if any, by the director, for services before the department, and the board may review the fee fixed by said director. Any attorney's fee set by the department or the board may be reviewed by the superior court upon application of such attorney. Where the board, pursuant to this section, fixes the attorney's fee, it shall be unlawful for an attorney to charge or receive any fee for services before the board in excess of that fee fixed by the board. Any person who violates any provision of this section shall be guilty of a misdemeanor."