Kaufman, Coral

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Combined effects of preexisting and subsequent disabilities

A worker cannot establish permanent total disability by combining the effects of the industrial injury with an unrelated condition preexisting the injury, when there was no discernible disability due to that condition until after the injury had occurred. **….*In re Coral Kaufman*, BIIA Dec., 59,962 (1982)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CORAL A. KAUFMAN	**)**	**DOCKET NO. 59,962**
	)	
CLAIM NO. G-834568	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Coral A. Kaufman, by
William V. Cottrell

Employer, Department of Social and Health Services,
Steven W. Brooks, Safety Education Representative

Department of Labor and Industries, by
The Attorney General, per
Gregory M. Kane and Jerry Hertel, Assistants

This is an appeal filed by the claimant on July 9, 1981 from an order of the Department of Labor and Industries dated May 20, 1981, adhering to the provisions of a prior order which awarded the claimant a permanent partial disability of 40% of the amputation value of the left leg at or above the knee joint with functional stump and an unspecified disability of 5% as compared to total bodily impairment. **AFFIRMED**.

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 Department of Labor and Industries to a Proposed Decision and Order issued on June 9, 1982, in which the order of the Department dated May 20, 1981 was reversed, and remanded to the Department with direction to reopen the claim and to place the claimant on the pension rolls as a permanently totally disabled worker.

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

One of the issues presented by this appeal, i.e., extent of the claimant's permanent disability on or about May 20, 1981 due to her industrial injury of January 7, 1976, and the evidence presented by the parties thereon, are adequately set forth in the Proposed Decision and Order. We disagree with the conclusion reached, however.

Additionally, an issue of time-loss compensation was not considered by the Proposed Decision and Order. Mrs. Kaufman raised the time-loss issue in her notice of appeal, and at the first conference her attorney reasserted it. In her testimony the claimant indicated that she sought

time-loss payments from November of 1979 until August of 1980, stating that such payments had been made to her until the former date. Dr. Lamberton testified that Mrs. Kaufman had been physically and emotionally unable to return to any kind of work since the occurrence of the industrial injury. Relative to the causation of this inability to work, however, he indicated that it was attributable to other conditions as well, including cancer (which had required hospitalization and surgery in the form of a radical mastectomy) and exacerbation of her lupus erythematosus. The transcript contains no medical testimony purporting to show that the effects of the industrial injury, standing alone, prevented Mrs. Kaufman's employment during the period from November 1979 to August 1980, and time-loss compensation is therefore not payable.

We turn then to the issue of permanent disability. In Shea v. Department of Labor and Industries, 12 Wn. App. 410, 413 (1974), decided by the Court of Appeals, Division 2, the claimant's medical evidence showed him to be permanently totally disabled from unrelated causes within a few months following the occurrence of the industrial injury. It was the claimant's contention in Shea that, despite the foregoing, he should still have been permitted to show that during the following years the industrial injury, standing alone, had also rendered him permanently totally disabled. The holding of the court of appeals was to reverse the superior court, which had dismissed the appeal on the ground that as a matter of law the evidence was insufficient to establish a prima facie case to submit to the jury.

"Significant contributing cause," dictum found at page 415 of Shea, supra, was used in the Proposed Decision and Order in this case to recommend that Mrs. Kaufman be declared a permanently totally disabled worker, based upon all of the claimant's conditions and diseases.

However, even Shea did not purport to combine the effects of an industrial injury with subsequently developing unrelated diseases or disabilities. It is abundantly clear from the opinion in Wendt v. Department of Labor and Industries, 18 Wn. App. 674, 681 (1977), issued some three years later, the Court of Appeals, Division 2, did not intend to depart from Washington's settled rule of "proximate causation" by the phrase quoted from Shea, which the court pointed out had been used only as an explanation for its holding.

That same court, speaking in Allen v. Department of Labor and Industries, 30 Wn. App. 693, 701 (1981), stated that ". . .the jury would have been warranted in concluding that plaintiff is presently totally disabled, and that such disability resulted from an aggravation of his initial [1965] injury superimposed upon the 2nd [1970] injury" (parenthetical dates supplied). At page 700, the

court criticized the holding in Erickson v. Department of Labor and Industries, 48 Wn. 2d 458 (1956), as being sui generis, the inference being that it was immaterial whether the unrelated disability, with which the disability from the appealed industrial injury was combined, occurred before or after said industrial injury. We note, however, that the holding of the court in Allen was to again reverse a superior court judgment which had dismissed claimant's appeal on the ground that as a matter of law there was insufficient evidence to support a verdict for claimant.

We have consistently followed the rule, since its announcement by the Supreme Court in Erickson, supra, that the disability from a subsequent industrial injury could be combined with and superimposed upon a previous unrelated disability in determining the existence of permanent total disability. The reasoning is logical and equitable. First, when an employer hires a worker, he takes that worker with all pre-existing disabilities. This is fair, since the employer has had the opportunity to conduct a pre-employment physical examination and has had the opportunity to exercise his legal right to accept or reject the job-applicant based thereon. Second, when such pre-existing disabilities are combined with, and have superimposed upon them, the disability from a subsequent industrial injury, it is clear that the "proximate" causation of the resultant permanent total disability (if such results) has been the industrial injury and not the pre-existing disability.

However, to hold the employer liable, under the Industrial Insurance Act for unrelated subsequently developing conditions (or previous quiescent conditions which independently develop into subsequent disabilities) is to make that employer an insurer of the general health of every employee who has sustained an industrial injury while so employed. We do not believe that was the intent of the legislature.

As applied to the facts in this case, Mrs. Kaufman's cancer was diagnosed subsequent to the occurrence of the industrial injury. Her hospitalization, surgery, and prolonged debilitating course of chemotherapy treatment therefor all occurred after the injury. Her systemic lupus erythematosus was diagnosed, and had produced enough symptoms to require medical treatment, prior to the occurrence of the industrial injury. The latter disease, therefore, was not "lighted up" by the injury. Miller v. Department of Labor and Industries, 200 Wn. 674, 682 (1939). Mrs. Kaufman has been treated for her chronic colitis (which produced chronic diarrhea) since she was 20 to 30 years of age. The transcript does not contain a preponderance of evidence purporting to show that any of these three conditions were either caused or significantly aggravated by the occurrence of the industrial injury.

We further note that there is no medical evidence in the transcript to show that either of the pre-existing conditions resulted in any discernable disability prior to the industrial injury. Erickson, supra.

Lastly, there is no medical evidence which suggests that the extent of the claimant's permanent partial disability, attributable to the industrial injury of January 7, 1976, was any greater on May 20, 1981 than she had previously been awarded by the Department.

We agree that Mrs. Kaufman has many serious conditions which may now well prevent her from ever again returning to work. It is clear, however, that the 1976 industrial injury and its residuals do not satisfy the legal requirement for proximate cause of such unemployable status.

FINDINGS OF FACT

After a careful review of the entire record, the following findings are made:

1. On January 14, 1976, the Department of Labor and Industries received a report of accident alleging that Coral A. Kaufman, the claimant herein, had sustained an industrial injury on January 7, 1976, while in the course of her employment with the Department of Social and Health Services. On February 13, 1976 an accident report was received from the employer. On June 18, 1980, the Department of Labor and Industries issued its order closing the claim with a permanent partial disability award of 20% of the amputation value of the left leg at or above the knee joint with functional stump, and time-loss compensation as paid. On July 3, 1980, Mrs. Kaufman filed with the Department a timely notice of protest and request for reconsideration. On July 14, 1980, the Department issued an order holding in abeyance its previous order dated June 18, 1980, pending further consideration. On August 4, 1980, the Department issued an order setting aside its prior order dated June 18, 1980, and granted Mrs. Kaufman an award for permanent partial disability equal to 40% of the amputation value of the left leg at or above the knee joint with functional stump, less 20% previously paid, and an amount equal to 5% as compared to total bodily impairment. On October 1, 1980, the Department issued an order holding in abeyance its previous order of August 4, 1980, pending further investigation. On May 20, 1981, the Department issued an order adhering to the provisions of its order of August 4, 1980. On July 9, 1981, Mrs. Kaufman filed a notice of appeal with the Board of Industrial Insurance Appeals. On July 30, 1981, this Board issued its order granting the appeal and directed that proceedings be held on the issues raised by the appeal.

2. On and immediately prior to January 7, 1976, claimant had a condition diagnosed as chronic colitis, producing chronic diarrhea; this condition had been diagnosed and medically treated since claimant was 20 to 30

years of age. This condition was neither caused nor aggravated by Mrs. Kaufman's industrial injury of January 7, 1976.

3. On and immediately prior to January 7, 1976, claimant had a condition diagnosed as systemic lupus erythematosus, which had required some medical treatment. This condition was neither caused nor aggravated by the industrial injury of January 7, 1976.

4. Subsequent to January 7, 1976, claimant developed cancer of the breast, which required hospitalization, surgery in the form of a radical mastectomy, and prolonged debilitating chemotherapy treatment thereafter. This condition was neither caused nor aggravated by the industrial injury of January 7, 1976.

5. On May 20, 1981, as a result of her industrial injury of January 7, 1976, Mrs. Kaufman had the following conditions: Post-operative state, following the surgical removal of a torn medial meniscus of the left knee, with formation of degenerative arthritic changes involving the knee joint and patellofemoral joint, with the eventual fracture of the femoral condyles, which though healed, probably contributed to the arthritic change; and a lumbar strain which aggravated pre-existing degenerative arthritic changes; healed rib fractures; and healed sterno-clavicuar joint injury on the left side. All of these conditions were fixed and further treatment was not indicated. Mrs. Kaufman's disability from these conditions did not exceed the award which have previously been granted and paid to her by the Department: 40% of the amputation value of the left leg at or above the knee joint with functional stump; and an impairment in her lumbar spine most closely described by Category 2 of WAC 296-20-280, (5% as compared to total bodily impairment).

6. Mrs. Kaufman is 37 years of age, has completed high school and business college and has earned college unit credits equivalent to those of a sophomore with a sociology major; she has a highly diversified lifetime history of employment, including the following: homemaker and assistant to the child abuse officer while with the Division of Social and Health Services; a telephone operator (long-distance, ship-to-shore and mobile) and supervisor of telephone operators for pacific Northwest Bell; credit manager for the Omak branches of both Montgomery Ward and Sears Roebuck; and work of a manual nature for Crown-Zellerbach and Biles- Coleman.

7. Prior to her industrial injury of January 7, 1976, the claimant had no permanent disability.

8. On May 20, 1981, when claimant's residual disability attributable to her industrial injury of January 7, 1976 was considered with the factors of her age, her education, and her history of previous employments, claimant was not prevented from performing a regular gainful occupation on a reasonably continuous basis.

9. During the inclusive period from November 1979 through August of 1980, the claimant was not temporarily totally prevented from performing a gainful occupation on a reasonably continuous basis by any condition causally related to her industrial injury of January 7, 1976.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the following conclusions are reached:

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

2. During the inclusive period from November 1979 through August of 1980, Coral A. Kaufman was not temporarily totally disabled as a result of her industrial injury of January 7, 1976 and was not entitled to time-loss compensation therefor.

3. On May 20, 1981, Coral A. Kaufman was not a permanently totally disabled worker as a result of her industrial injury of January 7, 1976.

4. The order issued by the Department of Labor and Industries on May 20, 1981, adhering to the provisions of its previous order dated August 4, 1980, which had closed the claim with an award for permanent partial disability equal to 40% of the amputation value of the left leg at or above the knee joint with functional stump, and 5% as compared to total bodily impairment, less prior awards, was correct and should be affirmed.

It is so ORDERED.

Dated this 1st day of September 1982.

BOARD OF INDUSTRIAL INSURANCE APPEALS
/s/_____
MICHAEL L. HALL Chairman
/s/_____
PHILLIP T. BORK Member

DISSENTING OPINION

The majority opinion states that Allen, cited supra, infers that it is immaterial whether an earlier or later disability is combined with the disability of the industrial injury under appeal, in determining the existence of permanent total disability. Allen does not infer that principle; it states it concretely, in the very sentence (at page 701 of Allen) quoted by the majority.

Allen has set forth the rule of law which, by the overwhelming preponderance of the evidence in this case, proves Mrs. Kaufman to be permanently totally disabled as a result of her industrial injury of January 7, 1976. She is entitled to nothing less than a pension.

Dated this 1st day of September, 1982.

/s/_____
FRANK E. FENNERTY, JR. Member