Wassmann, Jean

AGGRAVATION (RCW 51.32.160)

Permanent total disability

While it is not necessary to show an increase in category of impairment to establish an aggravation of condition resulting in permanent total disability, the worker must still show an increase in loss of bodily function demonstrated by objective medical findings. **….*In re Jean Wassmann*, BIIA Dec., 69 953 (1986)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JEAN M. WASSMANN	**)**	**DOCKET NO. 69,953**
	)	
CLAIM NO. H-712795	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Jean M. Wassmann, by
Calbom & Schwab, per
Kenneth Schmidt, G. Joseph Schwab, and Gary Gleba

Employer, Memory Manor Nursing Home,
None

Department of Labor and Industries, by
The Attorney General, per
Dennis J. Beemer, Laurie F. Connelly, William Dodge, and Gregory M. Kane, Assistants

This is an appeal filed by the claimant on March 1, 1985 from an order of the Department of Labor and Industries dated February 6, 1985 which denied claimant's application to reopen her claim because of aggravation of condition. **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 claimant to a Proposed Decision and Order issued on February 25, 1986 in which the order of the Department dated February 6, 1985 was affirmed.

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.

The issues presented by this appeal and the evidence presented by the parties are very adequately set forth in the Proposed Decision and Order. We are in agreement with the proposed disposition of the material issues. However, we granted review for the purpose of clarifying the degree of proof required to establish "aggravation" in claims in which the rating of permanent partial disability is determined by reference to the categories of permanent impairments, WAC 296-20-200, et. seq.

We hold that in such cases it is not essential for a worker to establish an increase in Category of permanent impairment in order to satisfy the "aggravation" requirement of RCW 51.32.160. To satisfy the threshold aggravation test, it is sufficient if there is medical testimony establishing an increase in disability (i.e., loss of bodily function) over that which existed on the first terminal date.

Such increase in disability must be corroborated by one or more increased objective clinical findings, and be proximately caused by the industrial injury or occupational disease. Because Mrs. Wassmann has not established an increase in disability (i.e., a loss of bodily function) we conclude that the Department order is correct and should be affirmed.

RCW 51.32.160 permits, within prescribed time limits, a readjustment in a worker's rate of compensation where it is shown that there has been an aggravation of the worker's condition. To reopen a claim for such readjustment a worker must establish by medical testimony, based in part on objective findings, that there has been an aggravation of his or her condition which results in increased disability. Moses v. Department of Labor and Industries, 44 Wn. 2d 511, 517 (1954). An application to reopen a claim for aggravation is not an opportunity to contest the reasonableness of the original disability determination. The principles of res judicata prohibit such relitigation. To prevail on an application to reopen there must be medical evidence of a material change or "worsening" in the worker's condition since the last date of claim closure. Such change must be in the form of an increase in disability.

The term "disability", as applied to unspecified permanent partial disability, has long been understood to mean a loss of bodily function. Franks v. Department of Labor and Industries, 35 Wn. 2d 763 (1950). Although there is a large degree of interplay between the concepts of permanent partial and permanent total disability, See Fochtman v. Department of Labor and Industries, 7 W. App. 286 (1972), evidence in an aggravation case that a worker is not capable of gainful employment has been held insufficient to prove aggravation. Dinnis v. Department of Labor and Industries, 67 Wn. 2d, 654 (1965). We therefore believe that the type of increased "disability" which must be established in an aggravation case is that type which results in an increase in loss of bodily function.

Prior to the adoption of the categories of permanent impairment in 1974, awards for permanent partial disability were expressed in percentages of either total bodily impairment or the so-called maximum allowed for unspecified disabilities. The pre-1974 case law involving issues of aggravation required a showing of a percentage increase in disability. See, e.g., Moses v. Department of Labor and Industries, 44 Wn. 2d at 519.

In 1971 the Legislature authorized the Department to establish rules classifying unspecified disabilities in the proportion they bear to total bodily impairment. 1971 LAWS, 1st Ex. Sess., c. 289, Sec. 10; RCW 51.32.080(2). The express purpose of this authorization was to "reduce litigation and establish more certainty and uniformity in the rating of unspecified permanent partial disabilities".

RCW 51.32.080(2). Acting upon this authorization the Department, as of October 1, 1974, adopted the categories of permanent impairments, WAC 296-20-200, et. seq. The effect of the category system was to replace the previous spectrum of percentage ratings, primarily subjectively arrived at through a broad range by individual doctors' opinions or "guesstimates", with a limited number of categories more objectively describing levels of permanent partial impairment. The advantage of the category system is that there is much less room for dispute among medical professionals as to the level of permanent partial impairment. One disadvantage, it is argued by some, is that a worker may develop an increase in disability, i.e., loss of bodily function, but yet not to a degree which warrants being placed in the next higher category of impairment.

Arguably, the adoption of the categories of permanent impairment could be said to have modified the legal proof required to establish aggravation. If under Moses the worker was required to prove a percentage increase in disability, then arguably a worker must now establish a category increase in the level of permanent impairment. We do not think, however, that for all purposes an increase in category is necessary to prove aggravation. The categories are merely a means for consolidating a previously broad spectrum of disability rating possibilities in order to simplify, and make more certain and uniform, the process of making monetary awards for permanent partial disability, and to reduce litigation over this issue. The category system has met with considerable success in achieving these legislative goals. However, there is no indication that the Legislature also intended to modify the standards, developed by case law, for determining aggravation under RCW 51.32.160.

There is no question that medical evidence offered in support of a permanent partial disability award must be expressed in terms of the categories. Vliet v. Department of Labor and Industries, 30 Wn. App. 709 (1981). A worker who may have some increase in loss of bodily function, and yet not significant enough to be placed in the next higher category of impairment, would be precluded from obtaining an increased permanent partial disability award following a claim for aggravation. However, this should not preclude such a worker from establishing an increase in loss of bodily function which may warrant reopening a claim for treatment for aggravation, or which may warrant, along with the several other necessary evidentiary requirements, a status of permanent total disability.

The burden is still upon the worker, of course, to establish by medical testimony that there has been an increase in loss of function or disability. When directed to the issue of aggravation, and not to the rating of permanent partial impairment, such medical testimony which reasonably quantifies and

describes an increase in disability or loss of bodily function between the terminal dates, based at least in part on increased objective findings, is sufficient for a prima facie case.

In the instant case, both orthopedic surgeons who testified were of the opinion that the claimant's disability was best described by Category IV of the categories for lumbosacral impairments, WAC 296-20-280 -- which was the Category she was awarded on the first terminal date. When asked whether the claimant's disability had become "aggravated or worse" between the terminal dates, Dr. Donald Smith simply stated "I can't say". Dr. James Green, who examined the claimant as part of a panel examination on January 10, 1985, was of the opinion that the claimant had "the same degree of disability on the second terminal date as she had on the first terminal date." He acknowledged that a comparison of x-ray reports from 1982 with x-ray reports from 1985 showed some increased degeneration and narrowing at the L5/S1 level. He agreed that, given the nature of the category system, a person can have some worsening on an objective basis, but not fall into the next higher category. He admitted that the claimant's condition had "progressed" in the sense that the "x-ray picture is worsened", but he noted that a difference in findings is not necessarily an indication of increased disability. It was his opinion that the claimant best fit Category IV for lumbosacral impairments, and that she did not have an "increased disability".

We find the testimony of Dr. Smith insufficient to establish an increase in disability during the aggravation period. The testimony of Dr. Green is most persuasive, and while his testimony establishes that there was an increase in x-ray findings, it does not support an increase in disability. On examination, a patient may present many clinical findings, some of which may be objective. Findings themselves, however, do not ipso facto establish the existence of disability. Naillon v. Department of Labor and Industries, 65 Wn. 2d 544 (1965).

The claimant also alleged that she had developed a major depression as a result of the industrial injury. The Department, on the other hand, presented persuasive evidence that the claimant had longstanding personality problems, and that her psychiatric problems were due to marital difficulties and conflicts over dependence. We adopt the Industrial Appeals Judge's evaluation of the testimony of Drs. Bot and Carter, and agree with his determination that the claimant did not have a mental health condition causally related to the June, 1980 industrial injury.

We are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law. The claimant has failed to prove that her condition, causally related to the June 9, 1980 industrial injury, became aggravated between November 1, 1983

and February 6, 1985. It is therefore inappropriate to reach the issue of whether or not the claimant was capable of gainful employment on a reasonably continuous basis, as of the second terminal date. The Department order of February 6, 1985 will be affirmed.

FINDINGS OF FACT

Proposed Findings of Fact Nos. 1 through 8 are hereby adopted as the final Findings of this Board and are incorporated by this reference. In addition, this Board makes the following additional Findings of Fact.

9. Between November 1, 1983 and February 6, 1985 claimant's lumbosacral condition, causally related to the June 9, 1980 industrial injury, did not become more disabling.

10. As of February 6, 1985 the claimant did not have a psychiatric condition or psychiatric disability proximately caused by the industrial injury of June 9, 1980.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter and the parties to this appeal.

2. Between November 1, 1983 and February 6, 1985, claimant's disability causally related to the industrial injury of June 9, 1980, did not become aggravated within the meaning of RCW 51.32.160.

3. The Department order dated February 6, 1985, denying the claimant's application to reopen her claim because of aggravation of condition, is correct and should be affirmed.

It is so ORDERED.

Dated this 30th day of June, 1986.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
GARY B. WIGGS Chairperson

/s/_____
PHILLIP T. BORK Member