Holstrom, Ronald

SCOPE OF REVIEW

Aggravation

When the Department denies an application to reopen for aggravation of condition which has alleged the existence of a new condition and the Board reverses that order, the Board cannot reach the issues of treatment and disability but must remand to give the Department an opportunity to rule on those questions in the first instance.
….*In re Ronald Holstrom*, BIIA Dec., 70,033 (1986)

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RONALD F. HOLSTROM	**)**	**DOCKET NO. 70,033**
	)	
CLAIM NO. G-875511	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ronald Holstrom, by
Small, Winther, Snell & Logue, per
Richard Weiss, Gregory F. Logue, and Stella Georgeness, Legal Intern

Employer, RSR Corporation, Quemetco, Inc. (Finaled)
None

Department of Labor and Industries, by
The Attorney General, per
John Wasberg, Byron Brown, Assistants; and Tadd Shimazu, Legal Intern

This is an appeal filed by the claimant on March 13, 1985 from an order of the Department of Labor and Industries dated February 15, 1985 which adhered to the provisions of a prior order dated November 16, 1983 which denied claimant's application to reopen for aggravation of condition. **REVERSED AND REMANDED**.

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 November 12, 1985 in which the order of the Department dated February 15, 1985 was reversed, and this claim remanded to the Department with direction to reopen and to issue an order awarding claimant permanent partial disability equal to 50% of the loss by amputation value of both arms at any point from below the elbow joint distal to the insertion of the biceps tendon to and including mid-metacarpal amputation of the hand and take such other and further action as may be indicated by the facts and the law.

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 following additional rulings are made with respect to Dr. Griffith's deposition: The objection on page 44, lines 17-18, is sustained; the motion on page 47 is granted and the motion on page 35 is granted. With respect to the hearing held on September 12, 1985 the following ruling is made: The testimony appearing on page 58, line 2, through page 60, line 7, is removed from colloquy; all evidentiary rulings with respect to that testimony are affirmed.

The issue presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order. In its Petition for Review the Department does not contest the determination that claimant's industrially related condition became aggravated between September 13, 1976 and February 15, 1985. The Department contends, however, that our Industrial Appeals Judge exceeded this Board's scope of review in going further and rating the claimant's permanent partial disability. The claimant contends that the allegation in his notice of appeal that he was seeking an increased permanent partial disability award is sufficient to place that issue before us.

This Board's jurisdiction is appellate only. If a question has not been passed upon by the Department, it cannot be reached by us. The issues which may be resolved by the Board "are fixed by the order from which the appeal was taken [citation omitted] as limited by the issues raised by the notice of appeal [citation omitted]." Lenk v. Department of Labor and Industries, 3 Wn. App. 977, 982 (1970) (emphasis added). Claimant's allegation that he is entitled to an increased permanent partial disability award cannot bring that issue within our appellate jurisdiction unless that question has first been considered by the Department. The notice of appeal can never expand the boundaries of our review, but should instead ideally narrow the issues to be litigated.

The claim for aggravation in this case involves a new condition, focal segmental amyotrophy, which arose after the first terminal date. The Department rejected the claimant's application to reopen because it considered this condition unrelated to the industrial injury. Having made that determination, the Department had no occasion to go further and determine the need for treatment or, alternatively, the extent of permanent disability due to a condition which it had already determined was not causally related to the industrial injury.

There is a fundamental difference between an aggravation case in which the worker contends that the same condition which existed at the time of the first terminal date has worsened and an aggravation case in which the worker contends that a new condition causally related to the industrial injury has arisen since the first terminal date. In the former case, the causal relationship of the condition to the industrial injury has already been accepted by the Department. Thus to determine if that accepted condition has worsened, the Department must, of necessity, determine whether that condition is fixed and, if so, the extent of increased permanent disability. Inherent in a determination that an accepted condition has not worsened is the determination that no treatment is necessary and that there is no increase in permanent disability. Noll v. Department of Labor and Industries, 179 Wash. 213 (1934).

On the other hand, a "new condition" aggravation case is analogous to a reject case. The threshold issue before the Department is whether the new condition is in fact causally related to the industrial injury. If the Department determines that there is no causal relationship, then it obviously need not go any further. The Department does not, and should not be expected to, engage in a hypothetical inquiry to determine whether it would have found that the claimant had an increased permanent disability if it had decided that the condition was causally related to the industrial injury.

The court in Noll implicitly recognized this distinction between "same condition" and "new condition" aggravation cases by distinguishing such reject cases as Cole v. Department of Labor and Industries, 137 Wash. 538 (1926). In Cole the court held that when the Department rejects a claim it does not pass upon the question of the extent of permanent disability. Thus, when a Department order rejecting a claim is reversed, the claim must be remanded to the Department to consider those questions which have not yet been resolved, for example, the extent of permanent disability.

In Noll the court approved the Cole holding, stating:

> "Clearly, in the Cole case, in deciding that the injuries were not the result of a fortuitous event, the department had no occasion to examine into the nature and extent of those injuries, or to determine what, if any, award should be made therefor, and very clearly this court there applied the correct rule." Noll at 216."

The decision of Shufeldt v.Department of Labor and Industries, 57 Wn. 2d. 758 (1961) cited by the Department in support of its Petition for Review is also instructive to the extent that it presents the flip side of the issue raised by this case. The court in Schufeldt held that when the issue raised is whether a condition is causally related to an industrial injury, the claimant is not required to present evidence on the question of extent of disability. Conversely, the question of extent of disability should not be reached by this Board when the only question decided by the Department was the threshold question of whether the condition was causally related to the industrial injury.

In the present case, the Department concluded that claimant's focal segmental amyotrophy was not causally related to the industrial injury of April 6, 1976. The Department did not determine nor make any investigation whether that condition was fixed or productive of any permanent disability. Our Industrial Appeals Judge exceeded the scope of this Board's review in reaching those questions.

After consideration of the Proposed Decision and Order, the Department's Petition for Review, the claimant's Reply, and the entire record, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence insofar as it concludes that claimant's focal

segmental amyotrophy is causally related to the industrial injury and constitutes a worsening of claimant's condition attributable to the industrial injury between the two terminal dates. The Proposed Decision and Order is incorrect, however, in going further and rating claimant's permanent partial disability due to that condition. That question has not been passed upon by the Department and the Department will be given an opportunity to consider that issue on remand.

FINDINGS OF FACT

Proposed Findings of Fact 1, 2, 3 and 4 are adopted as this Board's findings and are incorporated herein by reference. Proposed Findings of Fact 6 and 7 are deleted. Finding 5 is corrected to read as follows:

> 5. As of February 15, 1985 claimant's condition causally related to the industrial injury of April 6, 1976 was diagnosed as focal segmental amyotrophy secondary to anterior horn cell or motor root injury to the spinal cord at the eighth cervical and first thoracic segments resulting in denervation to claimant's hand muscles causing marked atrophy. As a result of the atrophy claimant has lost strength in his hands and the ability to do fine coordinated finger movements.

CONCLUSIONS OF LAW

Proposed Conclusions of Law 1 and 2 are adopted as this Board's Conclusions and incorporated herein by reference. Conclusion 3 is deleted, and in its stead the following Conclusion is entered:

> 3. The order of the Department of Labor and Industries dated February 15, 1985, adhering to the provisions of a prior order dated November 16, 1983 denying claimant's application to reopen his claim for aggravation of condition, is incorrect and should be reversed and the claim remanded to the Department of Labor and Industries to allow the application to reopen the claim and to provide benefits as indicated and authorized by law.

It is so ORDERED.

Dated this 25th day of March, 1986.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
GARY B. WIGGS Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member