Woody, Donald

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Rating by Board

The Board may determine that a worker's permanent partial disability is greater than any category testified to by the medical experts, provided the Board's rating is supported by the objective findings in evidence. **….*In re Donald Woody,* BIIA Dec., 85 1995 (1987)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In Re: DONALD R. WOODY	)	DOCKET NO. 85 1995
	)	
CLAIM NO. H-844504	)	DECISION AND ORDER
	)	

APPEARANCES:

Claimant, Donald R. Woody, by
Stiles & Stiles, per
Brian Stiles and William A. Stiles, Jr.

Employer, Hamilton Cedar Products, Inc., by
Brandon Parks

Department of Labor and Industries, by
The Attorney General, per
Bruce Clement, William Hochberg and William Strange, Assistants

This is an appeal filed by the claimant on August 14, 1985 from an order of the Department of Labor and Industries dated June 13, 1985 which denied responsibility for cervical and left calf injuries, awarded permanent partial disability of 15% as compared to total bodily impairment for lumbosacral impairment, to be paid at 75% of the monetary value pursuant to RCW 51.32.080(2), and closed the claim. 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 August 21, 1986 in which the order of the Department

dated June 13, 1985 was reversed and remanded to the Department with direction to continue to deny responsibility for cervical and left calf injury, and to pay an award for permanent partial disability in accordance with Category 5 of WAC 296-20-280, categories of permanent dorso-lumbar and lumbosacral impairments, less prior awards, and thereupon close the claim with time loss compensation as paid.

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 adequately set forth in the Proposed Decision and Order. The only proposed disposition contested by the Department is the extent of permanent disability. Review has been granted to consider whether permanent partial disability may be awarded in excess of the impairment rating of the medical experts, when objective findings clearly support such an award.

The Department first contends that the clinical and x-ray findings of disability in this claimant's low back are not sufficient to support a Category V, WAC 296-20-280, permanent lumbosacral impairment. A Category V, WAC 296-20-280, inpairment is defined as:

> Moderate low back impairment, with moderate continuous or marked intermittent objective clinical findings of such impairment, with moderate x-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.

A Category IV, WAC 296-20-280, permanent lumbosacral impairment, is defined as:

> Mild low back impairment, with mild continuous or moderate intermittent objective clinical findings of such

> impairment, with mild but significant x-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.

This and subsequent categories include the presence or absence of a surgical fusion with normally expected residuals.

The Category V rating is obviously supportable by the clinical and radiographic findings of Dr. Charles Thomas, orthopedic surgeon, who concluded that Mr. Woody's low back condition was "somewhere between moderate and marked", and observed a moderate limitation of low back motion. As limitations in claimant's low back motion were observed in several physical examinations, this finding must be considered to be a moderate, continuous, objective clinical finding. Dr. Thomas also found marked x-ray findings at the level of the fifth lumber vertebrae and the sacrum, with moderate findings at the level of the fourth and fifth lumbar vertebrae. The only item in the definition of Category V which was not present in Mr. Woody was the "mild but significant motor loss objectively demonstrated by atrophy and weakness . . .". It would be inconsistent for the Department to rate claimant's low back condition below Category V just because of the lack of this one finding, inasmuch as it is identically within the description of Category IV, the impairment level the Department contends is correct, even lacking this finding. WAC 296-20-220(1)(g) only requires the selection of the "category which most accurately reflects the overall impairment;" all findings in the description of a particular category need not necessarily be present before a rating at that category is merited.

The Department's reliance on Sanchez v. Department of Labor and

Industries, 39 Wn. App. 80 (1984), in contending that Dr. Thomas incorrectly used the terms "moderate" and "marked," is misplaced. The Sanchez court evidently assumed that a "finding" was the same as an "impairment". However, each of these terms has a precise, and different, meaning. Impairment is defined by WAC 296-20-220(1)(c) as "a loss of physical or mental function." Objective findings are defined by WAC 296-20-220(1)(i) as "those findings on examination which are independent of voluntary action and can be seen, felt, or consistently measured by examining physicians." Thus, it is possible for a person to exhibit "marked" (i.e., in the most severe third) objective findings to substantiate disability and yet have only a "mild" or "moderate" functional loss or impairment. The opposite may be true as well. The categories themselves demonstrate these possible happenings. For example, while Category V describes moderate low back impairment, it may include marked objective findings. Also, a claimant may have one or more marked objective findings of disability even though his overall impairment is mild, contrary to the conclusion of Sanchez. Therefore, Sanchez should not be relied upon for a legal analysis of the terms "moderate" and "marked".

Although, under WAC 296-20-220, sufficient objective findings exist, of both moderate and marked character, to rate claimant's low back impairment at Category V, Dr. Thomas, the only medical professional able to rate a permanent impairment (See Brannan v. Department of Labor and Industries, 104 Wn. 2d 55 (1985), rated his low back impairment at Category IV. The Department cites Page v. Department of Labor and Industries, 52 Wn. 2d 706 (1958), Ellis v.

Department of Labor and Industries, 88 Wn. 2d. 844 (1977), and Johnson v. Tradewell Stores, Inc., 24 Wn. App. 53 (1981), in support of the general proposition that a finder of fact cannot exceed the maximum amount of permanent partilal disability testified to by the expert medical witnesses.

However, this view oversimplifies the case law. There is precedent to award a higher percentage of permanent partial disability than the numerical amount testified to by medical witnesses when that higher amount of disability is supported by objective findings in evidence. In Dowell v. Department of Labor and Industries, 51 Wn. 2d 428 (1957), two doctors testified that the permanent disability was only 20% of the maximum allowed for unspecified disabilities, and a third physician did not testify to a percentage of disability. However, the Washington Supreme Court sustained a jury verdict for 80% of the maximum allowed for unspecified disabilities since the third doctor testified to sufficiently severe objective findings upon which to base that verdict. Ellis, supra, at p. 852, approved the result in Dowell because it was based on objective findings in evidence. In Anthis v. Department of Labor and Industries, 16 Wn. App. 335 (1976), the medical testimony indicated that the claimant's organic disability rating was 10%, and a psychiatrist testified to a psychiatric disability of 15%, but stated that that disability was more disabling than the loss of an arm. Citing Dowell, supra, the court found that the failure of the witness to testify in the language of the statute was not fatal to claimant's claim for a permanent partial disability award greater than 25% and remanded the claim for trial on

the issue of the extent of that disability. See, also, Coleman v. Prosser Packers, 19 Wn. App. 616 (1978).

This is not to say that the finder of fact may categorize a permanent partial disability at any level it desires, without regard for the objective findings. However, just as we often see a medical expert overrate an impairment in comparison to the objective findings, and the law allows the finder of fact to remedy that error, so it seems logical and proper to allow the finder of fact to also remedy an error occurring when a medical expert obviously underrates an impairment in light of the objective findings. Such responsibility is consistent with the principle that the question of the extent of permanent disability is ultimately for the finder of fact, Dowell, supra. We are not saying, of course, that a finder of fact may find a level of permanent disability which is not supported by the objective findings in evidence.

FINDINGS OF FACT

We hereby incorporate Proposed Findings of Fact 1, 2, 3 and 5 as the Board's final Findings. Proposed Finding No. 4 is hereby stricken, and the Board enters Findings No. 4 and No. 6 as follows:

> 4. As of June 13, 1985, the claimant exhibited impairment in his lumbosacral spine, best described as a moderate low back impairment, with moderate continuous objective clinical findings, and with moderate and marked x-ray findings. The overall impairment is consistent with and most accurately expressed by Category V, WAC 296-20-280. There were marked objective findings of such impairment.
>
> 6. Any cervical and left calf conditions from which claimant suffers are not causally related to the March 25, 1981 industrial injury.

CONCLUSIONS OF LAW

We hereby incorporate Proposed Conclusions of Law Nos. 1 and 2 as the Board's final Conclusions. Proposed Conclusions No. 3 and No. 4 are hereby stricken, and the Board enters the following Conclusions:

3. Pursuant to WAC 296-20-680(3), claimant exhibited a permanent partial disability equal to 25% as compared to total bodily impairment.

4. The order of the Department of Labor and Industries dated June 13, 1985, which denied responsibility for cervical and left calf injuries under this claim, and paid an award for permanent partial disability equal to 15% as compared to total bodily impairment for lumbosacral impairments, and closed the claim with time-loss compensation as paid, is incorrect and should be reversed and remanded to the Department with directions to continue to deny responsibility for cervical and left calf conditions under this claim, to pay claimant a permanent partial disability award equal to 25% as compared to total bodily impairment, at full monetary value, less prior awards, and thereupon to close the claim with time-loss compensation as previously paid.

It is so ORDERED.

Dated this 24th day of February, 1987.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
GARY B. WIGGS Chairperson

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

/s/_____
PHILLIP T. BORK Member