Elliott, Rose

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Part-time employment

Worker, who was a part-time bingo caller at the time of her injury and was capable of returning to such employment, was not deprived of her ability to follow her previous occupation and was therefore not permanently and totally disabled. ***….In re Rose Elliott,* BIIA Dec., 87 4017 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 89-2-05748-0.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROSE M. ELLIOTT	**)**	**DOCKET NO. 87 4017**
	)	
CLAIM NO. J-382206	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Rose M. Elliott, by
F. Curtis Hilton

Employer, Boys & Girls Clubs Tacoma/Pierce County, by
None

Department of Labor and Industries, by
Office of the Attorney General, per
Steve LaVergne, Paralegal, and
Deborah D. Brookings and Charles M. McCullough, Assistants

This is an appeal filed by the claimant, Rose M. Elliott, on December 4, 1987 from an order of the Department of Labor and Industries dated November 23, 1987 which closed the claim with an award for permanent partial disability equal to 10% as compared to total bodily impairment paid at 75% of the monetary value. **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 December 6, 1988 in which the order of the Department dated November 23, 1987 was reversed and the claim remanded to the Department with instructions to place the claimant on the pension rolls as a totally and permanently 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.

The issues presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order and will not be repeated at any great length here. Ms. Elliott was working as a bingo caller on a part-time basis on February 10, 1984 when she fell and injured her back. She testified that she worked approximately three and one-third hours per day, three days per week. Ms. Elliott worked as a bingo caller for six years, from 1978 to 1980 for one employer and from 1980 to 1984 for the current employer.

Ms. Elliott had sustained a prior industrial injury to her low back in 1982 which necessitated a laminectomy at the L4/5 level. Robert Johnson, M.D., an orthopedic surgeon, treated the claimant for

that industrial injury and performed the laminectomy on November 2, 1983. Dr. Johnson examined the claimant on January 24, 1984, two weeks prior to the industrial injury which is the subject of this appeal, and it was Dr. Johnson's opinion that as of that date the claimant's low back impairment was best described by Category 1 of WAC 296-20-280. As a result of the February 10, 1984 industrial injury, claimant had low back surgery performed on July 31, 1985 by Galen Hoover, M.D., an orthopedic surgeon. Subsequent to the surgery, the claimant remained under the treatment of Dr. Hoover. Dr. Hoover Testified that the low back surgery failed to give Ms. Elliott any relief from her symptoms.

Ms. Elliott testified that her job as a bingo monitor required her to lift weights up to seven pounds on a frequent basis and that she was not required to perform any kitchen duties. Elizabeth Rodgers, a vocational rehabilitation counselor, testified on direct examination that the claimant was totally and permanently disabled as a result of her industrial injury. In reaching this conclusion, she relied upon (1) the physical capacities evaluation as testified to by Dr. Galen Hoover; (2) the physical requirements of bingo monitors as listed in the Dictionary of Occupational Titles; and (3) her personal observation of bingo monitors. Significantly, Ms. Rodgers did not observe the activities of bingo monitors at the Boys & Girls Clubs where the claimant was employed at the time of her industrial injury. Ms. Rodgers believed the claimant was not able to return to her former work because she was incapable of meeting the lifting requirements of bingo monitors as listed in the Dictionary of Occupational Titles. Ms. Rodgers was not aware that the claimant was not required to perform any kitchen duties, nor was she aware that the claimant testified that her maximum lifting requirement was approximately seven pounds. Ms. Rodgers admitted that based on the physical limitations imposed by Dr. Hoover, the claimant could return to her former job as a bingo caller. Therefore, looking solely at the testimony of the claimant's witnesses, it is clear that the claimant was capable of returning to her former occupation.

We are convinced that the claimant sustained a significant industrial injury on February 10, 1984. However, the evidence does not lead to the conclusion that, as a result of the industrial injury, the claimant was totally and permanently disabled as that term is defined by statute (RCW 51.08.160) or case law. See Allen v. Dept. of Labor & Indus., 30 Wn App 693, 697-698 (1981); Kuhnle v. Dept. of Labor & Indus., 12 Wn 2d 191, 198-199 (1942). Prior to the industrial injury, the claimant was working as a bingo caller three and one-third hours per day, three days per week. She had apparently been so employed on a regular basis for some six years prior to the industrial injury. Subsequent to

the industrial injury, the claimant was still capable of working in that same capacity. There has been no showing that the claimant has been deprived of her ability to "follow her previous occupation" due to the residuals of the industrial injury. Under these circumstances, she is not entitled to be placed upon the pension rolls.

It was Dr. Hoover's opinion that, as of November 23, 1987 when the Department closed her claim, Ms. Elliott's condition was fixed and stable and her impairment was best described by Category 4 of WAC 296-20-280. Michael Potter, M.D., a board-certified neurosurgeon, evaluated Ms. Elliott for the Department of Labor and Industries on May 15, 1987. It was Dr. Potter's opinion that, as of November 24, 1987, the claimant's impairment was best described by Category 3 of WAC 296-20-280.

Our review of the evidence convinces us that Category 4 best describes the claimant's permanent impairment and she is therefore entitled to a commensurate permanent partial disability award. We note that as the claimant's attending physician, Dr. Hoover's opinion is entitled to special consideration. Hamilton v. Dept. of Labor & Indus., 111 Wn 2d 569, 571 (1988); Groff v. Dept. of Labor & Indus., 65 Wn 2d 35, 45 (1964). As the claimant's attending physician, Dr. Hoover not only performed the surgery but had an opportunity to observe the claimant on numerous occasions over a considerable period of time. In contrast, Dr. Potter only saw the claimant on a single occasion. Additionally, Dr. Potter reached his decision primarily because his examination did not disclose atrophy and weakness of a specific muscle or muscle group. It is not necessary that a claimant have each and every finding listed in a specific category. It is merely necessary that the category most accurately reflects the overall impairment. WAC 296-20-220(g). In the present case, we are convinced that Category 4 more accurately reflects the impairment causally related to the industrial injury than does Category 3.

FINDINGS OF FACT

1. On February 21, 1984 the claimant filed an accident report with the Department of Labor and Industries alleging the occurrence of an industrial injury on February 10, 1984 while in the course of her employment with Boys & Girls Clubs of Tacoma/Pierce County. On April 23, 1985 the Department issued an order closing the claim with time loss compensation as paid and with an award for permanent partial disability equal to 10% as compared to total bodily impairment. On May 13, 1985 the Department received a protest from the claimant's physician recommending further treatment. On May 31, 1985, the Department issued an order setting aside and holding for naught its order of April 23,

1985 and directing the claim to remain open for treatment and further action. On November 23, 1987 the Department issued an order closing the claim with time loss compensation as paid and with an award for unspecified disabilities of 10% as compared to total bodily impairment. On December 4, 1987 the claimant filed a notice of appeal from the Department order of November 23, 1987. On December 31, 1987 the Board issued an order granting the appeal, assigning it Docket No. 87 4017 and directing that further proceedings be held in the matter.

2. In 1982 claimant sustained an injury to her low back which resulted in laminectomy surgery in 1983. Prior to February 10, 1984, claimant's condition causally related to the 1982 injury was fixed and stable and productive of no permanent impairment.

3. On February 10, 1984 while in the course of her employment as a bingo monitor with Boys & Girls Clubs of Tacoma/Pierce County, the claimant tripped on a wire and fell, injuring her low back. The claimant experienced pain in her back and legs, with the left being worse than the right.

4. The industrial injury of February 10, 1984 aggravated claimant's preexisting perineural scarring from laminectomy surgery performed in 1983 as well as her preexisting degenerative disc disease, and necessitated further laminectomy surgery on July 31, 1985.

5. As of November 23, 1987, the claimant's condition causally related to her industrial injury of February 10, 1984 was a low back injury superimposed upon the previous low back injury of 1982 and surgery of 1983. As of November 23, 1987, claimant's condition causally related to the industrial injury of February 10, 1984 was fixed and no further treatment was available which would be reasonably likely to improve her condition.

6. As of November 23, 1987, the claimant exhibited back and leg pain, diminished deep tendon reflex at the knee, loss of deep tendon reflex at the ankle, and significant x-ray findings.

7. As of November 23, 1987, the claimant had significant limitations with respect to bending, lifting, twisting and standing, with lifting and carrying limited to five to ten pounds and with repeated twisting and standing to be avoided.

8. The claimant is a 64 year old woman with a ninth grade education, low average intelligence and no transferable skills. Her work history is that of a bingo caller, waitress, cook, house cleaner, and, more remotely, cannery worker and riveter.

9. For six years prior to the industrial injury of February 10, 1984 claimant was employed as a bingo caller. From 1980-1984 she was employed 3.3 hours per day, three days a week, for Boys & Girls Clubs Tacoma/Pierce County.

10. As of November 23, 1987, the claimant's impairment causally related to her industrial injury of February 10, 1984 was best described by Category 4 of WAC 296-20-280.

11. As a result of her February 10, 1984 injury, and taking into account her age, education, work history and physical restrictions, the claimant was not precluded, as of November 23, 1987, from returning to her previous occupation as a a bingo caller or from engaging in reasonably continuous gainful employment in other work generally available in the State of Washington for which the claimant had qualifications by way of education and experience.

CONCLUSIONS OF LAW

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

2. As of November 23, 1987, the claimant was entitled to an award for permanent partial disability equal to 15% as compared to total bodily impairment pursuant to WAC 296-20-680(3).

3. As of November 23, 1987 claimant was not a permanently totally disabled worker within the meaning of RCW 51.08.160.

4. The November 23, 1987 Department order, which closed the claim with an award for permanent partial disability equal to 10% as compared to total bodily impairment, is incorrect and should be reversed, and this matter remanded to the Department with directions to make an award to the claimant for permanent partial disability equal to 15% as compared to total bodily impairment, paid at 75% of the monetary value pursuant to RCW 51.32.080(2), and thereupon close the claim.

It is so ORDERED.

Dated this 7th day of July, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
PHILLIP T. BORK Member