

Vargas, Nestor

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Gainful Employment

Where a worker performs services at a gas station in order to become more active on an intermittent and informal basis, and does not receive wages or any remuneration in exchange for the services, such activity does not constitute a return to gainful employment for wages.*In re Nestor Vargas, BIIA Dec., 89 2000, (1991)* [special concurring opinion]

SCOPE OF REVIEW

Order terminating pension since worker gainfully employed

Where an order terminating pension is based upon the determination a worker returned to gainful employment, the Board will not consider the question of diminution of the worker's disability.*In re Nestor Vargas, BIIA Dec., 89 2000, (1991)* [special concurring opinion]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: NESTOR C. VARGAS**) **DOCKET NO. 89 2000**
2)
3 **CLAIM NO. S-307507**) **DECISION AND ORDER**
4

5 APPEARANCES:

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7 Claimant, Nestor C. Vargas, by
8 James D. Pack

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10 Self-Insured Employer, Welco Lumber Company, by
11 Eisenhower, Carlson, Newlands, Reha, Henriot and Quinn, per
12 Richard A. Jessup

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14 This is an appeal filed by the claimant, Nestor C. Vargas, on May 17, 1989 from an order of the
15 Department of Labor and Industries dated April 28, 1989. The order adhered to the provisions of an
16 order dated March 29, 1989 that terminated the claimant's total permanent disability pension pursuant
17 to RCW 51.32.160 because the claimant had returned to gainful employment. The Department order
18 is **REVERSED**.
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21) **PROCEDURAL AND EVIDENTIARY MATTERS**
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23 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
24 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
25 issued on June 28, 1990 in which the order of the Department dated April 28, 1989 was affirmed.
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27 The Board has reviewed the evidentiary rulings in the record of proceedings. Our industrial
28 appeals judge removed from colloquy the testimony of Dr. Irving Tobin and of Dr. William Hummel.
29 Because we conclude that the issue of diminution, or lessening, of Mr. Vargas' disability is not properly
30 before us, all testimony concerning the issue of diminution is hereby placed in colloquy. All other
31 evidentiary rulings are hereby affirmed.
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35) **DECISION**
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37 The factual background underlying this appeal and the evidence presented by the parties are
38 adequately set forth and summarized in the Proposed Decision and Order, and will only be restated
39 here as necessary to explain our decision. We conclude that this Board lacks subject- matter
40 jurisdiction to consider the issue of diminution of the claimant's disability. Further, we conclude that
41 Mr. Vargas has carried his burden of establishing by a preponderance of the evidence that he did not
42 return to gainful employment for wages.
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1 RCW 51.32.160 provides two bases for suspending or terminating the rate of compensation
2 paid to a worker receiving a pension for total disability. The first, referred to in the statute as
3 diminution or termination of disability, requires medical evidence to the effect that a diminution of the
4 disability has actually occurred. Dep't of Labor & Indus. v. Moser, 35 Wn.App. 204, 665 P.2d 926
5 (1983). Alternatively, the rate of compensation paid to a worker receiving a pension for total disability
6 may be suspended or terminated if the worker "returns to gainful employment for wages." The statute
7 explicitly states that in such a case it is not necessary to produce medical evidence that shows a
8 diminution of the disability has occurred. Thus, the two grounds for terminating a pension are entirely
9 distinct, and require different determinations based upon a consideration of different forms of
10 evidence.
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12 In the present case, it is abundantly clear that Mr. Vargas' pension was terminated solely for the
13 reason that he had returned to gainful employment for wages. First, the order of the Department
14 dated March 29, 1989, to which the order on appeal adhered, clearly states that the Department
15 terminated Mr. Vargas' pension because he had "returned to gainful employment". Second, Mr.
16 William Travis, a Pension Adjudicator with the Department of Labor and Industries and the individual
17 responsible for issuing the orders terminating Mr. Vargas' pension, testified that he issued those
18 orders based solely upon a determination that Mr. Vargas had returned to gainful employment for
19 wages. Mr. Travis testified that the Department did not consider whether or not Mr. Vargas' disability
20 had lessened, and stated that the employer's representative rejected his suggestion that an
21 independent medical examination be scheduled in order to make such a determination. Indeed, in a
22 letter to Mr. Travis on December 9, 1988, the employer's representative specifically stated:
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24 Although in our recent telephone conversation you suggested that Welco
25 should also schedule a medical examination of Mr. Vargas to determine
26 if his physical condition has changed since his claim was last closed, I do
27 not believe such an examination is necessary. The above-referenced
28 statute specifically states:
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30 If a worker receiving a pension for total disability returns to gainful
31 employment for wages, the director may suspend or terminate the rate of
32 compensation established for the disability without producing medical
33 evidence that shows that a diminution of the disability has occurred.
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35 Exhibit No. 4. In fact, there is absolutely nothing in the record from which we may infer that the
36 Department considered or passed upon the question of diminution.
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1 We therefore lack the authority to consider whether a diminution of disability occurred. This
2 Board's jurisdiction is appellate only, and the questions we may consider and decide are fixed by the
3 order from which the appeal was taken as limited by the issues raised by the notice of appeal. Lenk v.
4 Dep't of Labor & Indus., 3 Wn.App. 977, 478 P.2d 761 (1970). This is not to say, however, that we
5 may never look beyond the order to determine the issues actually considered and decided by the
6 Department. For example, if the order on appeal in this case had merely stated that the claimant's
7 pension was being terminated pursuant to RCW 51.32.160, it would be incumbent upon us to
8 determine whether the Department had actually considered and decided the issue of diminution. If it
9 had, it would be incumbent upon us to also consider and decide that issue. However, to consider and
10 decide an issue not first passed upon by the Department would be to exceed our subject-matter
11 jurisdiction.
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13 Having determined that we lack jurisdiction to consider the issue of diminution, we wish to state
14 that were that issue before us we would still find for the claimant. In fact, the "colloquy" record
15 persuasively and clearly establishes that the disability resulting from Mr. Vargas' industrial injury has
16 increased, rather than decreased, since he was placed on the pension rolls effective August 2, 1980.
17 According to William Hummel, M.D., a board-certified orthopedic surgeon who performed a two-level
18 fusion to the claimant's low back in 1979, the further surgery performed on the claimant's low back in
19 May of 1989 was directly related to Mr. Vargas' 1979 industrial injury and resulting surgeries done in
20 that year. Dr. Hummel testified that the stenosis, or narrowing of the spinal canal, for which the
21 surgery in 1989 was performed, was attributable to the 1979 industrial injury and the resulting
22 two-level spinal fusion. Dr. Hummel further testified that in 1979 no stenosis was present; by 1989 the
23 spinal stenosis was described as severe by the neurosurgeon who performed the surgery in 1989 to
24 attempt to correct it. This evidence clearly supports the conclusion that Mr. Vargas' disability resulting
25 from his industrial injury had increased since he was placed on the pension rolls. It is hardly rebutted
26 by the testimony of Dr. Irving Tobin, who examined the claimant on one occasion in 1980, and who
27 based his opinion that the claimant's disability had lessened upon a 15 to 20 minute review of portions
28 of a videotape of the claimant taken intermittently during three different days in the fall of 1988, and a
29 review of medical records of Dr. Hummel from early 1989. Dr. Tobin acknowledged those records
30 showed the presence of spinal stenosis in Mr. Vargas' low back for which the decompression surgery
31 was done in May 1989. He said he had "no idea" if the stenosis was present back in 1980. Dr.
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1 Hummel did have such knowledge, namely, no stenosis was present then and it developed over the
2 succeeding years.
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4 We also conclude that the claimant did not return to gainful employment for wages. In fact, as
5 stated by our industrial appeals judge, it is uncontroverted that Mr. Vargas did not return to gainful
6 employment for wages. According to Mr. Vargas, he began performing services at a gas station in
7 order to try to become more active. This was done, on an informal and intermittent basis, over about
8 eight months from mid-1988 into the early part of 1989. Mr. Vargas stated that he did not receive any
9 wages or other remuneration in exchange for those services. This testimony is supported by that of
10 Mr. James P. Butler, who operated the gas station in question. According to Mr. Butler, the claimant
11 was paid no consideration whatsoever, and Mr. Vargas paid for any facilities or services he used for
12 his own vehicle, to the same extent that any member of the public paid. There is simply no evidence
13 in the record to support the contention that Mr. Vargas, at any time since being placed on the pension
14 rolls, returned to gainful employment for wages.
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21 After consideration of the Proposed Decision and Order, the claimant's Petition for Review, the
22 employer's Response to the Petition for Review, and a careful review of the entire record before us,
23 we are persuaded that the Department order of April 28, 1989, which adhered to the provisions of the
24 order dated March 29, 1989, is incorrect and should be reversed and the claim remanded to the
25 Department with direction to reinstate the claimant's pension benefits, effective March 29, 1989, and to
26 take such other and further action as may be indicated or required to implement such reinstatement.
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30 Proposed Findings of Fact Nos. 1, 2, and 3 are hereby adopted as this Board's final findings. In
31 addition, the Board enters the following findings and conclusions:
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33 **FINDINGS OF FACT**

- 34 4. The claimant did not, at any time after being placed on the pension rolls,
35 return to gainful employment for wages.
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37 5. At the Department level, the self-insured employer chose not to schedule
38 a medical examination to determine if claimant's condition had changed.
39 In requesting the termination of Mr. Vargas' pension, the self- insured
40 employer relied solely on the contention that Mr. Vargas had returned to
41 gainful employment. The Department did not consider or pass upon
42 whether a diminution of the claimant's disability occurred, and its orders of
43 March 29, 1989 and April 28, 1989 were based solely on the Department's
44 determination that the claimant had returned to gainful employment for
45 wages.
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CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal. The Board lacks subject matter jurisdiction over the issue of whether a diminution of the claimant's disability occurred. The sole issue before the Board is whether claimant's pension was properly terminated on the grounds that he had returned to gainful employment for wages. RCW 51.32.160.
2. Because claimant did not return to gainful employment for wages, the Department incorrectly terminated his pension. RCW 51.32.160.
3. The order of the Department of Labor and Industries dated April 28, 1989, which adhered to the provisions of an order dated March 29, 1989 that determined that the claimant had returned to gainful employment and terminated the claimant's pension pursuant to RCW 51.32.160, is incorrect and should be reversed and the claim remanded to the Department with direction to reinstate the claimant's pension, effective March 29, 1989 and to take such other and further action as may be indicated or required to implement such reinstatement.

It is so **ORDERED**.

Dated this 11th day of February, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
SARA T. HARMON Chairperson

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

SPECIAL CONCURRING STATEMENT

I concur with my colleagues in the ultimate determination to reinstate this claimant's pension benefits effective March 29, 1989.

However, I do not agree with their belief that we lack jurisdiction to consider the question of diminution of the claimant's disability. The Department order on appeal terminated the claimant's pension pursuant to RCW 51.32.160, and I believe that either of the grounds set forth in that statute may properly be considered by the Board in determining the correctness of such order.

My colleagues' position on this issue is an unnecessarily restrictive view of the Board's reviewing authority. Furthermore, it has the potential of fostering piecemeal litigation (although not in

1 this particular case, in view of the "colloquy" record made on the diminution issue). We have taken the
2 position in a number of cases over the years that we are not necessarily bound strictly, as to the
3 issues to be decided on appeal, by language in the Department's order appearing to show it was
4 based on limited grounds. For example, the Department may reject a claim on only one of several
5 possible grounds, but on appeal, we have taken the position that the general question of allowance or
6 rejection, i.e., compensability of the claim, is before us, and we have considered and made
7 determinations on issues inherent in that question, although different from the ground stated in the
8 Department order. See, e.g., In re James L. Couchman, Dec'd., Dckt. No. 86 1625 (January 4, 1989).
9 Our courts have held similarly, as applied to varied situations of appellate review of administrative
10 decisions under our Act. See Beels v. Dep't of Labor & Indus., 178 Wash. 301, 308 (1934); Noll v.
11 Dep't of Labor & Indus., 179 Wash. 213 (1934); Nelson v. Dep't of Labor & Indus., 9 Wn.2d 621,
12 631-632 (1941).

13 Thus, I believe that both issues on which the record in this case was made -- whether or not
14 there was a diminution of claimant's disability; and, whether or not he had returned to gainful
15 employment for wages -- are before us for decision. The Department order can be reviewed on both
16 grounds within the facts established by this record.

17 Having thoroughly reviewed the entire record on both of these issues, I find myself in
18 agreement with my colleagues' views as expressed in the discussion portion of their Decision.
19 Commencing with page 4, line 20, and through page 6, line 21, I concur completely therewith.

20 Conclusion of Law No. 3 makes the correct "bottom line" determination, namely, reinstatement
21 of claimant's pension benefits.

22 Dated this 11th day of February, 1991.

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PHILLIP T. BORK

Member