McGoff, Michael

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Chiropractors

A chiropractor is not qualified to testify on the question of permanent partial disability since WAC 296-20-200 and WAC 296-20-01002 provide for evaluation of bodily impairment to be made by a "physician." *Citing Brannan v. Department of Labor & Indus.*, 104 Wn.2d 55 (1985). **….*In re Michael McGoff*, BIIA Dec., 90 1897 (1991)** [dissent] [*Editor's Note*: *Overruled*, in part, *In re Bertha Ramirez*, BIIA Dec., 03 14933 (1990).]

Rating by Board

The Board will not evaluate evidence and determine extent of permanent partial disability beyond that given by the Department where the only testimony regarding findings which may support the award is provided by a chiropractor. *In re Donald Woody*, BIIA Dec., 85 1995 (1987). **….*In re Michael McGoff*, BIIA Dec., 90 1897 (1991)** [dissent] [*Editor's Note*: Consider application in light of *In re Bertha Ramirez*, BIIA Dec., 03 14933 (2004).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MICHAEL MCGOFF	)	**DOCKET NO. 90 1897**
	)	
CLAIM NO. K-601839	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Michael McGoff, by
Casey & Casey, per
Gerald L. Casey and Carol Casey

Employer, Harris Busheling (Account Finaled)

Department of Labor and Industries, by
The Office of the Attorney General, per
Linda L. Williams, Assistant

This is an appeal filed by the claimant on April 12, 1990 from an order of the Department of Labor and Industries dated March 30, 1990 which affirmed an order of November 14, 1989. The November 14, 1989 order closed the claim with time loss compensation as paid to July 26, 1989 and without award for permanent partial disability. **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 November 14, 1990 in which the order of the Department dated March 30, 1990 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 issue presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order.

This case was tried largely as a treatment case. See 8/13/90 Tr. at 2; 9/25/90 Tr. at 2. We agree wholeheartedly with our industrial appeals judge's determination that no further treatment is necessary. Mr. McGoff has failed to prove by a preponderance of credible evidence that more chiropractic care would be of benefit to him.

There are only two passing mentions that the claimant might be seeking permanent partial disability as an alternative form of relief: 7/3/90 Tr. at 2 and the general allegation in the Notice of Appeal. The claimant's Petition for Review never actually comes out and says that claimant is seeking

a permanent partial disability award. It is questionable whether claimant has preserved this issue. Nontheless, review has been granted for the limited purpose of addressing the question of whether Mr. McGoff has experienced any compensable permanent partial disability relative to his industrial injury of August 2, 1988.

It may well be that Mr. McGoff has a colorable claim to a permanent partial disability award. However, from a review the record, it is apparent that he has failed to present evidence of a nature that would permit a decision in his favor. His only expert witness, chiropractor Bryan Mittlestaedt, is unqualified to testify on the question of permanent partial disability. WAC 296-20-200 and WAC 296-20-210 and WAC 296-20-01002 are clear that an evaluation of bodily impairment must be made by a "physician," i.e., a "person licensed to perform one or more of the following professions: medicine and surgery; or osteopathic". WAC 296-20-01002. The court in Brannan v. Dep't of Labor & Indus., 104 Wn.2d 55, 59 (1985) wrote,

> Doctors of chiropractic come within the definitions of 'doctor' and 'practitioner' under the rules, but not within that of 'physicians'. Thus, the effect of the Department's rules is to restrict the rating of permanent partial disability in workers' compensation cases to medical and osteopathic physicians and surgeons.

Because Mr. McGoff failed to present any medical testimony concerning permanent disability, he has created a vacuum with respect to that issue that he now asks us to fill by ignoring well-established law prohibiting chiropractors from rating disabilities. He asks us to establish a compensable permanent partial disability by accepting the clinical findings made by the chiropractor even though we cannot accept the chiropractor's opinion on permanent partial disability. This is a path that we are not willing to follow. To do so would be to subvert the clear purpose of our state's industrial insurance laws that specify that impairments shall be rated only by those individuals accorded the special status of "physician".

In our leading decision of In re Woody, BIIA 85 1995 (1987), we concluded that permanent partial disability may be awarded in excess of impairment ratings of the medical experts, when objective findings clearly support such an award. Fundamental to the Woody case, however, was the fact that the findings and ratings of disability were made by physicians (medical doctors). This distinction has been recognized by a line of cases for over 30 years. In Dowell v. Dep't of Labor & Indus., 51 Wn.2d 428, 433 (1957) the courts noted that the question of the extent of permanent partial disability is ultimately for the jury as trier of fact but stated,

> We have held that the extent of a workman's disability must be determined by medical testimony, and that only medical men are qualified to give opinions on the extent of permanent partial disability in terms of percentages.

Similarly, the court in Page v. Dep't of Labor & Indus., 52 Wn.2d 706 (1958) observed that the jury in an industrial insurance appeal, as in the case of any other jury question, may arrive at a verdict that lies between the opinions of expert witnesses who have testified. It went on to state,

> The rule as thus stated is that medical testimony is necessary to establish permanent partial disability.

Id. 52 Wn.2d 709.

And finally, the court in Ellis v. Dep't of Labor & Indus., 88 Wn.2d 844 (1977) stated, in a case also involving the extent of the claimant's permanent partial disability,

> First, any increase of the award, above that given by the Board, must be established by medical testimony.

Id. 88 Wn.2d 850.

We are satisfied that there is no authority or statute upon which Mr. McGoff can predicate a permanent partial disability award based on the findings of his attending chiropractor. In light of Mr. McGoff's failure to present medical testimony, he has failed to make a prima facie case. No further consideration can be given to the question.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, 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.

Proposed Findings of Fact Nos. 1, 2, and 3 and Proposed Conclusion of Law No. 1 are hereby adopted as the Board's final findings and conclusion. Proposed Conclusion of Law No. 2 is renumbered to No. 3 and is adopted as the Board's final conclusion. In addition, the Board enters the following finding and conclusion:

FINDINGS OF FACT

4. As of March 30, 1990, the claimant's cervical spine was essentially normal with no evidence of muscle spasm, atrophy, reflex change or diminished sensation. Claimant's condition causally related to the industrial injury of August 2, 1988 was most consistent with Category 1 of WAC 296-20-240.

CONCLUSIONS OF LAW

2. As of March 30, 1990, the claimant was not entitled to further treatment and had no permanent partial disability causally related to his industrial injury of August 2, 1988.

It is so ORDERED.

Dated this 12th day of April, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
PHILLIP T. BORK Member

DISSENT

The majority has wrongly affirmed the closure of Mr. McGoff's industrial insurance claim without allowance for further treatment or permanent partial disability despite the unequivocal testimony from Mr. McGoff's treating physician, Dr. Mittlestaedt, that further care is indicated. Although closing the claim without allowing for further treatment is incorrect, it is even more difficult to understand why the majority would allow the claim to close without payment of a permanent partial disability award, given the clear findings that exist.

Although Dr. Maxwell's testimony is the only physician's testimony concerning the extent of cervical impairment, his rating of Category 1 under WAC 296-20-240 is unreasonably conservative. Dr. Mittlestaedt, who examined Mr. McGoff on a number of occasions, consistently observed diminished range of motion of the cervical spine, muscle spasm, and loss of the normal cervical curve. Furthermore, Mr. McGoff's 1989 MRI study, which is unquestionably objective, revealed extradural defects at C4-5, C5-6, and a moderate right paracentral disc herniation at C6-7 with mild cervical cord effacement. Mr. McGoff who is now 32 years old with no history of prior neck injuries, was hurt on August 2, 1988 when he was struck on the head by a falling tree limb. Since that time, he has had persistent neck pain which correlates with both the MRI evaluation and Dr. Mittlestaedt's findings. Clearly, he has experienced a compensable disability.

In the case of In re Donald Woody, BIIA Dec. 85,1995 (1987), the Board recognized that it may determine that a worker's permanent partial disability is greater than any category testified to by the

medical experts, provided that the Board's rating is supported by the objective findings in evidence. Mr. McGoff's case is precisely the situation in which the Board should exercise its authority to see that an injured worker receives the disability award to which he is entitled. To fail to do so here is to allow form to prevail over substance. There are objective findings in evidence to support a permanent partial award. Mr. McGoff should receive an award for Category 2 of cervical spine impairments.

Dated this 12th day of April, 1991.

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